A SUMMARY

OF THE

LAW OF TORTS

OR,

WRONGS INDEPENDENT OF CONTRACT.

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This Work,

WHICH WAS FORMERLY DEDICATED TO

JOSEPH UNDERHILL, ESQ., Q.C.,

THEN

Recorder of Newcastle-under-Lyme

AND A

Master of the Bench of the Honourable Society of the Middle Temple,

IS NOW

MOST REGRETFULLY INSCRIBED

To his Memory.

EDITOR'S PREFACE.

IN this Edition the arrangement of topics hitherto adopted has been retained. Where judicial decisions have made a re-statement of the law necessary, this has been attempted and the authorities referred to. In consequence it has been found requisite to re-arrange and partly rewrite the articles dealing with liability for Dangerous Premises, for the Escape from Premises of Dangerous Things (including Animals), for Wilful Torts of Servants, for Putting into Circulation Dangerous Chattels, and for Damage where the Immediate Cause is the Act of a Third Party. An endeavour has been made to bring the text up to date by incorporating the effect of all recent cases of adequate importance, and references to these will be found duly noted. The Editor wishes to acknowledge the valuable assistance he has received from Mr. W. H. Crawley of the Inner Temple both in the preparation and revision of this Edition.

A. C. HAGON.

4 KING'S BENCH WALK,
TEMPLE,
November 1921.

EXTRACT FROM PREFACE

TO THE EIGHTH EDITION.

THE facts that seven Editions of this Work have been sold, that an American firm have thought it worth their while to issue an unauthorised edition in the United States, and that a Canadian edition has been published, render it no longer necessary to apologise for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a Treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law ; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration,* that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place, to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher* v. *Rylands* and *Nichols* v. *Marsland* for instance ?

In the second place, the men are few indeed who can trust their memories to retain the contents of a large

treatise with accuracy: and although that is not necessary, yet it *is* essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work: and I still think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his digests and his reports: for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enables him to apply these principles to complicated facts with ease and certainty.

* * * * *

ARTHUR UNDERHILL.

5, NEW SQUARE, LINCOLN'S INN, W.C.
1st June 1905.

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THE LAW OF TORTS.

INTRODUCTION.

"THE maxims of law," says Justinian, "are these: To live honestly, to hurt no man, and to give every one his due." The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and insuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former consist of offences against the community at large, or offences—commonly called crimes—which, although primarily affecting individuals, are subversive of law and order; and as no redress can be given to the community, except by the prevention of such acts for the future, they are either stopped by injunction at the suit of the Attorney-General, or (in the case of crimes) visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are merely violations or deprivations of the legal rights of individuals. These admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation; and in some cases also restrains him by injunction from repeating the wrong.

But as injuries are divided into criminal and civil, so the latter are sub-divided into two classes, of injuries *ex contractu* and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by contract, and the latter (commonly called torts) such as spring from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border-line between them is by no means well defined.

Indeed, from the very nature of things, each division must to some extent overlap the others. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively placed in any one of the three classes.

In this Work an attempt has been made to state the principles which the law applies to those facts which constitute torts.

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

ART. 1.—*Definition of a Tort.*

A TORT is an act or omission which, independent of contract, is unauthorised by law, and results either—

(a) in the infringement of some absolute right to which another is entitled ; or
(b) in the infringement of some qualified right of another causing damage ; or
(c) in the infringement of some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally.

No one has yet succeeded in formulating a perfectly satisfactory definition of a tort ; indeed, it may be doubted whether a scientific definition, which would at the same time convey any notion to the mind of the student, is possible.

Comment on various definitions of Tort.

A tort is described in the Common Law Procedure Act, 1852, as **"a wrong independent of contract."** If we use the word "wrong" as equivalent to violation of a right recognised and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid ; for it gives no clue as to what constitutes a wrong or violation of a right recognised and enforced by law.

A tort may be described as a breach of a legal duty arising independently of contract and for which an action

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for damages can be maintained in a court of Common Law (*a*).

Examination of author's definition.

It will be perceived from the above definition that three distinct factors are necessary to constitute a tort according to our law. First, there must be some act or omission on the part of the person committing the tort (the defendant), not being a breach of some duty undertaken by contract. Secondly, the act or omission must not be authorised by law. Thirdly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some loss of property, health, or material comfort.

It is desirable at this stage to examine the third of these three factors a little more closely.

One often sees it stated in legal works that a *damnum absque injuriâ* is not actionable, but that an *injuria sine damno* is.

Meaning of "*damnum*" and "*injuria*."

By *damnum* is meant damage in the sense of **substantial** loss of money, comfort, health, or the like. By *injuria* is meant an unauthorised interference, however trivial, with some right conferred by law on the plaintiff (*ex. gr.* the right of excluding others from his house or garden). All that the maxims come to, therefore, is this: that no action lies for mere damage (*damnum*), however substantial, caused without breach of a legal right; but that an action does lie for interference with another's absolute legal private right, even where unaccompanied by actual damage, *e.g.* a trespass (*b*).

Read by the light of these observations, both the maxims in question are correct. For the interruption of an absolute right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation; and substantial damages have more than once

(*a*) And see Salmond, Law of Torts, 5th ed., p. 7.
(*b*) *Entick* v. *Carrington* (1765), 19 St. Tr. 1066.

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(in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But when no absolute private right has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

Damnum absque injuriâ

Damnum absque injuriâ means damage without infringement of any legal right, and it is clear that this is not actionable, even though the damage is caused by an unauthorised act, such as a crime or breach of trust.

For instance, murder is an act unauthorised by law, and it may inflict most cruel and particular damage on the family of the murdered man; but, nevertheless, at common law, that gives them no civil remedy against the murderer (*c*). So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society, for, though a man has in a sense a right to his own reputation, he has none in the reputation of his father (*d*). So a breach of trust, although not permitted in equity, and usually followed by private and particular loss to the beneficiaries, is not an infringement of any legal right, and therefore cannot properly be said to constitute a tort.

Injuria sine damno.

In the case of the invasion of an absolute private right, there is a wrong done to the plaintiff by the mere infringement of that right, and for every wrong there is a remedy by action "*ubi jus ibi remedium.*"

A man has an absolute right to his property, to the immunity of his person, and to his liberty. Thus, in actions of trespass whether to goods, lands, or the person (including assault and false imprisonment), actual damage is not an essential part of the cause of action, and a plaintiff is entitled to damages for the mere infringement of these rights.

Infringement of qualified private rights.

But there are some private rights which are only qualified rights, that is, rights to be saved from loss, and no action

(*c*) See *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.], *post*, p. 71.

(*d*) *Broom* v. *Ritchie* (1904), 6 F. 842, Ct. of Sess.

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will lie for an infringement of these rights without proof of actual damage. Thus, a person has not an absolute right not to be deceived, and in an action for fraud it is necessary for the plaintiff to show that the deceit complained of resulted in damage. So, too, in actions for nuisance (with some exceptions), malicious prosecution and negligence, damage is an essential part of the cause of action; as in all these cases the right infringed is only a qualified right —a right to be preserved from damage by certain acts or omissions of other persons.

Infringement of public rights.

Lastly, a tort may consist in the infringement of a public right, *i.e.*, a right which all men enjoy in common, coupled with particular damage. Take, for example, rights of highway. If a highway is obstructed, an injury is done to the public, and for that wrong the remedy is by indictment or by proceedings by the Attorney-General on behalf of the public. If every member of the public could bring an action, the number of possible actions for one breach of duty would be without limit (*e*). But if, in addition to the injury to the public, a special, peculiar and substantial damage is occasioned to an individual beyond the injury suffered by the public generally, then it is only just that he should have some private redress (*f*).

It will, therefore, be seen that there must be an act or omission either causing (a) an infringement of some absolute private right, or (b) an infringement of a qualified private right resulting in damage, or (c) an infringement of a public right resulting in substantial and particular damage to some person beyond that suffered by the public in general.

The act or omission must be unauthorised.

Again, the act or omission must be unauthorised, *i.e.*, not justifiable by law. If a sheriff enters on a man's land under due process of law to execute a writ of *fi. fa.*, his act, though an infringement of the right of property, is not tortious, because it is authorised by the judgment and writ of execution. So, too, an entry on land may be justified by

(*e*) See *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; *W. H. Chaplin & Co. Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329.

(*f*) See *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; and *Fritz* v. *Hobson*, 14 Ch. D. 542.

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necessity, or by its being done lawfully in the exercise of a right of way or by licence of the owner of the land. And trespasses to the person by beating or imprisonment may be justified by a sentence of a court of competent jurisdiction, and an assault may be justified by its being done in self-defence, or as reasonable chastisement by a parent or schoolmaster. In all these cases the acts done are *primâ facie* tortious, but are not actionable because they are authorised by law.

ART. 2.—*Ubi jus ibi remedium.*

A violation of every legal right (not being a breach of contract) committed without lawful justification is a tort.

Explanation.

"Any person who obtains possession, however innocently, of the goods of another who has been fraudulently deprived of them, and disposes of them whether for his own benefit or for that of any other person, is guilty of a conversion" (*g*). "Every invasion of private property, be it ever so minute, is a trespass" (*h*).

An action for tort is the appropriate remedy for every infringement of right which is not a breach of contract: and as rights are infinitely various, so are torts.

Classification of rights.

The rights, infringements of which constitute torts, include—

(1) *Personal rights*, such as the right everyone has to have his person immune from damage. Infringements of this right give rise to actions for trespass to the person (assault and false imprisonment), and when the character or reputation is attacked to actions for libel and slander. An action for negligence also lies for personal injuries caused by the negligence of another.

(2) *Rights of property.*—These include rights in respect of corporeal and of incorporeal property. Infringements of these rights give rise to actions for trespass to land and

(*g*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757.
(*h*) *Entick* v. *Carrington*, 19 Str. Tr. 1066.

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goods, nuisance, conversion and detention of goods, infringements of trade mark and patent rights, interference with easements and franchises, trade obstruction, fraud, etc.

ART. 3.—*Of Volition and Intention in relation to the unauthorised Act or Omission.*

(1) The unauthorised act or omission must be attributable to active or passive volition on the part of the party to be charged, otherwise it will not constitute an element of a tort (*i*).

(2) Nevertheless a want of appreciation of its probable consequences affords no excuse; for every person is presumed to intend the probable consequence of his acts.

(3) *Want of knowledge that the unauthorised act or omission is an infringement of right, as a rule affords no excuse.*

The student must carefully distinguish between the voluntary nature of the act or omission and the want of appreciation of its consequences. It would be obviously unjust to charge a man with damage caused by some inevitable accident, over which, or over the cause of which, he had no control. On the other hand, it would be highly dangerous to admit the doctrine, that a man who does an act, or makes an omission voluntarily, should be excused the consequences by reason of lack of judgment or of ignorance. So if a man consumes the goods of another, thinking they are his own, or trespasses on another's land, erroneously believing that there is a right of way, he is liable for the wrongful act he has done, and it is no excuse that he believed he had a right to do the act complained of.

Illustrations.

The following illustrations will, however, help to accentuate the difference better than pages of explanation:

(1) A newspaper published a defamatory article of a person described as "Artemus Jones." Neither the author

(*i*) See *Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546 [C. A.], and *S. C.*, in H. L., 2 App. Cas. 743; *The Nitro-glycerine Case*, 15 Wall. 524 (1872).

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of the article nor the editor knew that there was in existence a person of the name of Artemus Jones, and therefore they could not have intended to defame any particular person. In fact there was a barrister of that name to whom readers of the article might reasonably think the article referred. As the article was in fact defamatory of him, the publishers were liable, the injury to the plaintiff being the natural consequences of their publishing the article (*j*).

So, too, if a person makes a false defamatory statement of another, it is no defence that he believed it to be true (*j*).

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft was an unauthorised omission, and the fall of the plaintiff was the probable consequence of it (*k*).

(3) On the other hand, where a horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and knocked down the plaintiff, it was held that the defendant was not liable, as the accident was not attributable to any wrongful act or omission of the defendant or his servant (*l*).

(4) So, too, where a man accidentally shot another without intending to do so, and without being guilty of any negligence or want of care in the use of his gun, it was held that no action would lie. He had not been guilty of any imprudent act or omitted any precaution which a reasonable and prudent man would have taken (*m*).

(*j*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.

(*k*) *Indermaur* v. *Dames*, L. R. 2 C. P. 311; *White* v. *France*, 2 C. P. D. 308; *Norman* v. *G. W. Ry. Co.*, [1915] 1 K. B. 584; *Cox* v. *Coulson*, [1916] 2 K. B. 177 [C. A.]; *Pritchard* v. *Peto*, [1917 2 K. B. 173.

(*l*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145; *The Nitro-glycerin Case*, *ante*.

(*m*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

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ART. 4.—*Malice and Moral Guilt.*

Except in the case of an action for malicious prosecution, evil motive is not an essential ingredient in tort, but its presence may defeat a claim of privilege.

An evil motive cannot make wrongful an act that would otherwise not be so (*n*).

A good motive cannot justify an act that would otherwise be wrongful (*o*).

Malice.

"Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a **wrongful act done intentionally without just cause or excuse**" (*p*).

It is true to say of some acts that they are not tortious unless done maliciously, provided that the term "maliciously" is used in its strict legal sense. But malice in its popular sense has very little to do with the law of torts, and no action can ever be brought for a **lawful act** although done out of malice.

Thus, if A. intentionally and without just cause or excuse induce B. to break his contract of service with C., and damage results to C., A. commits a tort and may be sued by C.; and it is immaterial whether A. is influenced by good or bad motives (*q*). He may honestly think he is acting in the best interests of B. and C. His motive is then good; there is no "malice" in the sense of ill-will; but the act is malicious in the legal sense (*r*).

(*n*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Allen* v. *Flood*, [1898] A. C. 1; *Maxey Drainage Board* v. *G. N. Ry. Co.*, 106 L. T. 429 (1912).

(*o*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495.

(*p*) *Per* BAYLEY, J., in *Bromage* v. *Prosser*, 4 B. & C. 247, at p. 255.

(*q*) *Quinn* v. *Leathem*, [1901] A. C. 495; *Long* v. *Smithson* (1918), 118 L. T. 678; *Hodges* v. *Webb*, [1920] 2 Ch. 70.

(*r*) Note the limitation put on this liability by the Trades Disputes Act, 1906, s. 3, and see *Conway* v. *Wade*, [1909] A. C. 506; *Vacher & Sons, Limited* v. *London Society of Compositors*, [1913] A. C. 107; *Larkin* v. *Long*, [1915] A. C. 814.

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But if A. by lawful means induces B. not to enter into a contract of service with C., A. commits no wrong, and C. has no cause of action however much damage he may suffer, and although A. may be acting from the most wicked and selfish motives; for A.'s evil motive does not make wrongful his act which, apart from motive, is not a tort (*s*).

So, too, a man has a right to pump underground water from the subsoil under his own land. And this act being itself lawful is not actionable when done spitefully for the purpose of injuring his neighbour (*t*).

Malicious prosecution and libel.

The one kind of action in which evil motive is a necessary ingredient is malicious prosecution, and there is an apparent exception in the case of libel and slander. As to these, see *post*, Arts. 57 and 63.

Negligence.

Even negligence involves no moral guilt. The state of mind of the defendant is immaterial. The only question is, What has he done or left undone? Has he acted as a reasonable and prudent man would do in the circumstances? Not, Has he done what he thought was the best thing to do? The law pays no regard to the moral culpability of the defendant, but considers only whether his conduct has been reasonable and prudent as judged from the standpoint of the average man.

Fraud.

It is said, indeed, that in order to constitute fraud there must be some moral turpitude; and in a sense this is true. Actionable fraud consists in the making of an untrue representation with the intention of deceiving and with knowledge that it is untrue, or absolutely recklessly without caring whether it is true or untrue. The man who does this is no doubt in most cases morally guilty; but it is conceivable that a man may, from the highest motives and honestly believing that he is doing right, make a statement which he knows to be untrue, intending that that statement should deceive. Nevertheless his conduct, though possibly morally justifiable, is inexcusable in law.

(*s*) *Allen* v. *Flood*, [1898] A. C. 1; *Stott* v. *Gamble*, [1916] 2 K. B. 504; *Davies* v. *Thomas*, [1920] 2 Ch. 189; *White* v. *Riley*, [1921] 1 Ch. 1.

(*t*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

Art. 4. When, therefore, in the law of torts the phrase "malice" is used, it must be understood in its legal sense, *i.e.*, as meaning a wrongful act done intentionally without just cause or excuse. Only in connection with malicious prosecution or to defeat a claim of privilege has it a different meaning, and there, as will be seen hereafter, it does not necessarily mean ill-will against a person.

ART. 5.—*Of the connection of the Damage with the unauthorised Act or Omission.*

When the cause of action is for actual damage, the unauthorised act or omission must be shown to have been **the effective cause** of the damage, but not necessarily the immediate cause, that is to say, the damage must be such as would in the ordinary course of events flow from the unauthorised act or omission, as a natural and probable consequence.

Illustrations. (1) The defendant, in breach of the Metropolitan Police Act, 1839, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. If it had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. It was held that the defendant was not liable, as it was not the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance (*u*).

(*u*) *Sharp* v. *Powell*, L. R. 7 C. P. 258.

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(2) In another case the defendant wrongfully left a house-van and steam plough for the night on the grassy side of a highway. During the evening a mare which was being driven on the highway in a cart was frightened by the house-van and plough. The mare was a kicker, but the driver did not know she was. She shied, kicked, galloped away kicking, got her leg over the shaft and fell, and kicked the driver as he fell out of the cart. The driver was killed, and it was held that his death flowed directly from the unauthorised act of the defendant. The mare being a kicker, her running away and the accident to the driver was not an unnatural or improbable consequence of her being frightened (*v*).

(3) The plaintiff was riding a bicycle on a highway on the footpath of which was a fowl belonging to the defendant. The fowl was frightened by a dog and flew between the spokes of the bicycle wheel. Assuming it was a wrongful act to let the fowl be on the footpath, it was not a natural or probable result of its being there that it should fly between the spokes of the cyclist's wheel and upset him (*w*).

(4) Defendants' vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable was driven by wind and tide upon a sea-wall belonging to the plaintiffs, which it damaged :— *Held*, that the negligence of the defendants' servants was the effective cause of the damage to the sea-wall ; for it put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the combined effect of wind and tide would at the moment take it, and this was towards the sea-wall (*x*).

Explanation

The above illustrations will show the application of the rule where there is a chain of causation between the wrongful act or omission and the damage consisting of natural causes, whether of inanimate nature or of the lower animals. But sometimes there intervenes between the wrongful act

(*v*) *Harris* v. *Mobbs*, 3 Ex. D. 268.

(*w*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345 ; *Jones* v. *Lee* (1912), 106 L. T. 123.

(*x*) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204.

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or omission and the damage some act or omission of a third person. In these cases the rule is the same, though its application may be more difficult. It may be thus expressed:

Intervening act of third person.

Where an act of a third person intervenes between the wrongful act or omission and the damage, the wrongful act or omission is the effective cause if what the third person does is what such a person would naturally be expected to do in the circumstances (allowing for the frailty of human nature), but not otherwise (*y*).

Illustrations.

This rule is well illustrated by cases in which carts have been left on a highway unattended.

(1) In one case a cart was so left and a child seven years old got upon the cart in play, another child led on the horse and the first child was thereby thrown out and hurt. The owner of the cart was held liable, as it was a natural thing for children in such circumstances to play with an unattended cart (*z*). And where a driver of a van left it in charge of a tail-boy who drove on and came into collision with the plaintiff's carriage, it was held that the driver's leaving the cart in charge of a boy was the effective cause of the damage; what else could be expected of a boy than that he should try to drive the van? (*a*).

(2) But when a railway van was left by a railway company safely on a siding, locked, braked and coupled to a train, and mischievous boys trespassed on the siding and uncoupled the van and set it running down a slope so that it crossed a level crossing and injured the plaintiff, it was held that the company were not liable, as they could not reasonably have anticipated what actually happened (*b*). And in another case a drunken cabdriver, who fell asleep inside his cab, was held not liable for damage caused by

(*y*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.]; *Rickards* v. *Lothian*, [1913] A. C. 263; *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 155.

(*z*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*a*) *Engelhart* v. *Farrant & Co.*, *supra*.

(*b*) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331 [C. A.], followed in *Wheeler* v. *Morris* (1915), 113 L. T. 644 [C. A.].

another drunken cabdriver getting on to the box of his cab and driving away for his own pleasure. If the first drunken driver had thought about it at all he would not have thought of another drunken driver getting on his box and driving off (*c*).

(3) Where a gas company supplied a defective service pipe which leaked, and a gasfitter employed to test it went to look for the leak with a lighted candle, and an explosion resulted, it was held that the explosion was the direct consequence of the defendant's negligence in supplying a defective pipe (*d*).

(4) In the famous squib case the facts were that a person wrongfully threw a squib on to a stall at a fair, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and finally exploding, blinded the plaintiff. The liability of the person who originally threw the squib was in question, and DE GREY, C.J., said: "It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*e*).

ART. 6.—*The Act or Omission must be unauthorised.*

(1) An act or omission which is *primâ facie* tortious is not actionable if it is done under some lawful excuse.

(2) Among lawful excuses are that the act or omission is:

(i) An Act of State;
(ii) A judicial act;
(iii) An executive act;

(*c*) *Mann* v. *Ward*, 8 T. L. R. 699 [C. A.].
(*d*) *Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. 96.
(*e*) *Scott* v. *Shepherd*, 2 W. Bl. 892 [C. A.].

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(iv) An act or omission authorised by statute;
(v) An act or omission done by leave and licence.

Explanation. Besides these excuses there are others of a more special character, which are dealt with in connection with those torts in relation to which they generally arise.

The general excuses above enumerated are shortly explained in the following Articles. Some of them are more fully explained in later portions of this work.

ART. 7.—*Act of State.*

No action can be brought for damage resulting from an Act of State, whether the transaction constituting an Act of State be between two independent states or between a state and an individual foreigner (*f*).

NOTE.—It is not easy to define an Act of State; but it may be laid down generally that Acts of State are of two kinds: (1) Those which are transactions between two independent states, such as wars, treaties, annexation of territory, and so forth. An individual who suffers from such transactions has no cause of action, whatever other remedy he may have. (2) Those which are transactions between a state (*i.e.*, the government of this or any other country) and an individual foreigner. Sir James Stephen says (*g*): "I understand by an Act of State an act injurious to the person or to the property of some person **who is not at the time of that act a subject of Her Majesty**; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by Her Majesty. Such acts are by no means very rare, and they may, and often do, involve destruction of property and loss of life to a considerable extent." Though Acts of State of this kind are not

(*f*) Halsbury's Laws of England, Vol. I., pp. 14, 15.
(*g*) History of the Criminal Law, Vol. II., p. 61.

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confined to warlike operations, nevertheless warlike operations come within the rule. So a foreigner who has been wounded or whose property has been destroyed in war, has no cause of action in respect thereof (*h*).

It must be remembered, however, that the doctrine as to Acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. "As between the sovereign and his subjects there can be no such thing as an Act of State." So if one British subject destroys the property of another by the express command of the King, that command is no defence in an action of tort, for "courts of law are established for the express purpose of limiting public authority in its conduct towards individuals" (*i*). And an Act of State cannot be pleaded where the plaintiff is an alien but resident in the King's Dominions (*j*).

ART. 8.—*General Immunity of Judicial Officers.*

(1) No action lies against a judge of a *superior* court in respect of any act done by him in his judicial capacity, even though he act oppressively, maliciously, and corruptly (*k*).

(2) No action lies against a judge of an *inferior* court in respect of any act done by him *within his jurisdiction* (*l*).

(3) A judge of an inferior court is liable for anything he does in his judicial capacity **but without his jurisdiction if he knew or had the means of knowing** facts which would show that he had not jurisdiction (*m*).

(*h*) The leading case is *Buron* v. *Denman* (1859), 2 Ex. 167.

(*i*) See (*g*), p. 65; *Walker* v. *Baird*, [1892] App. Cas. 491.

(*j*) *Johnstone* v. *Pedlar*, [1921] W. N. 229 (H. L.).

(*k*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668 [C. A.].

(*l*) *Doswell* v. *Impey*, 1 B. & C. 163, 169. *Houlden* v. *Smith*, 14 Q. B. 841.

(*m*) *Calder* v. *Halket*, 3 Moo. P. C. 28.

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(4) No action lies against certain judicial officers in respect of acts done within the scope of their official capacity, *e.g.*, an Official Receiver (*n*).

NOTE.—The Supreme Court of Judicature (including the Court of Appeal and all the divisions of the High Court of Justice) is a superior court, as also are Assize Courts.

Inferior courts include county courts, the mayor's court, quarter sessions, and petty sessions.

It will be observed that the protection given to judges covers not merely what they do **lawfully**, as when they sentence convicted criminals to imprisonment, but also in many cases what they do **unlawfully**, as if a judge sentences an innocent person to imprisonment.

If it were not for the rule now under consideration a judge would be liable to an action for assault or false imprisonment if he ordered the arrest of or sentenced to imprisonment an innocent person. So, too, judges cannot be sued for slander in respect of defamatory words uttered by them in their judicial capacity. The following illustrations are cases of assault or false imprisonment. Illustrations of the immunity of judges from actions for libel and slander will be found in Art. 56.

Illustrations.

(1) Where the judge of the Supreme Court of Trinidad and Tobago caused the plaintiff to be imprisoned in default of finding bail, and the jury found that he had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, and to the prejudice of the plaintiff and the perversion of justice, the Court of Appeal held that, nevertheless, no action lay (*o*).

(2) Similarly, if a judge of a superior court acting in his judicial capacity sentences or orders a person to be imprisoned, no action for assault or false imprisonment lies.

(*n*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.
(*o*) *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668 [C. A.].

however erroneous and corrupt the sentence or order may have been. Art. 8.

(3) It will be noticed that though a judge of a superior court is protected, provided the judge is acting in his judicial capacity, in the case of a judge of an inferior court (*p*) the protection only extends to acts done by him **within his jurisdiction.** But if he exceeds his jurisdiction, as by sentencing a prisoner for an offence over which he has no jurisdiction, or in a place where he has no jurisdiction, although he acts in his judicial capacity, he is not protected, and may be sued for trespass.

The protection of the rule, however, extends to all cases in which **upon the facts before him** he would have jurisdiction. If on the facts as they are brought before him a judicial officer has jurisdiction, he is excused, even though when all the facts are known it is seen that he has none. But if he has before him facts from which he **knew or ought to have known** that he had no jurisdiction, he is not protected. If he assumes jurisdiction when in fact he has none by shutting his eyes to the facts, or by reason of his ignorance of the law, he is liable for any tort he commits in excess of his jurisdiction (*q*).

(4) So where a police magistrate fined a person for not causing his child to be vaccinated, and issued a distress warrant in default of payment, he was held liable as the summons itself showed he had no jurisdiction, the prosecution being more than six months after the offence (*r*).

Art. 9.—*General Immunity of Executive Officers.*

(1) An executive officer, such as a sheriff or gaoler or constable, acting on a warrant valid on

(*p*) It is not quite clear that the full measure of protection extends to inferior courts not of record (such as justices of the peace), but see the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1, and *Pease* v. *Chaytor*, 3 B. & S. 620.

(*q*) *Houlden* v. *Smith*, 14 Q. B. 841; *Willis* v. *Maclachlan*, 1 Ex. D. 376. See *Haggard* v. *Pelicier Frères*, [1892] A. C. 61 [P. C.]; *Quinn* v. *Pratt*, [1908] 2 Ir. R. 69.

(*r*) *Polley* v. *Fordham*, 91 L. T. 525. The case is reported on another point, [1904] 2 K. B. 345. See *post*, p. 97.

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the face of it and issued by a person who has jurisdiction, is absolutely protected for anything he does in pursuance of the warrant (*s*).

(2) But a warrant or order of a court which has no jurisdiction in the matter, is no protection (*t*) except in the case of constables, who are protected by statute for arresting under a warrant of a justice, notwithstanding any defect of jurisdiction (*u*).

NOTE.—Thus, when a governor of a prison, in obedience to a warrant of commitment which directed that the plaintiff should be imprisoned in a certain gaol for seven days, detained the prisoner from August 25th (the day following that of his arrest) until August 31st, it was held that, as he had acted in obedience to a warrant issued by a court which had jurisdiction, no action for false imprisonment lay against him, whether the sentence properly ran from the day of the arrest (August 24th) or from the day when he was lodged in prison (August 25th) (*v*).

So, too, a sheriff is absolutely protected if under a writ of *fi. fa.* he seizes the goods of the judgment debtor. But the writ is no protection to him if he seizes the goods of some other person, for the writ does not authorise him to do that.

ART. 10.—*Authorisation by Statute.*

(1) If the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful and no action will lie for any damage resulting from doing it, if it be done *without negligence.*

(2) An action does lie for doing that which

(*s*) *Henderson* v. *Preston*, 21 Q. B. D. 362 [C. A.]; *Ollict* v. *Bessey*, T. Jones Rep. 214.

(*t*) *Clark* v. *Woods*, 2 Ex. 395; *Wingate* v. *Waite*, 6 M. & W. 739.

(*u*) See Art. 119.

(*v*) *Henderson* v. *Preston*, 21 Q. B. D. 362.

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the legislature has authorised, *if it be done negligently* (*w*).

(3) If the legislature merely permits a thing to be done if it can be done without causing injury, an action lies if it is done in such a manner as to cause injury (*x*).

Explanation.

When the legislature expressly empowers a railway company to make a railway on a particular site and to run trains upon it, no action lies against the company for any nuisance caused by reason of the making of the railway on that site and the running of trains without negligence. Acts of Parliament giving such powers usually contain provisions for compensating persons who suffer by reason of their lands being taken or injuriously affected by the exercise of the statutory powers, but *no action lies*, for what the legislature has expressly authorised cannot be wrongful.

There is, however, an implied obligation not to be negligent in carrying out statutory powers and duties, and for breach of this obligation an action lies.

By many Acts of Parliament local authorities and other bodies are given general powers to execute works, such as making sewerage works for their district, erecting hospitals for infectious diseases, and the like. These things may obviously be nuisances if done or made in unsuitable places, but are not necessarily nuisances. Whether an Act is merely permissive, or is one which expressly authorises the doing of a thing, whether it be a nuisance or not, is a question of construction: but generally when the thing to be done **must necessarily** cause injury to someone, the Act will be construed as authorising the doing of it in any case: if the thing to be done **will not necessarily** cause injury, but will only do so if done in certain places or a certain way,

(*w*) *Per* Lord BLACKBURN: *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455; *Hammersmith Rail. Co.* v. *Brand*, L. R. 4 H. L. 171; for a recent example of misfeasance see *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K. B. 195.

(*x*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; *Charing Cross, etc. Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1914] 3 K. B. 772.

Art. 10. —— the Act will be construed as permissive only. "It cannot now be doubted," says Lord HALSBURY (*y*), "that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involve the creation of what would otherwise be a nuisance at common law."

Illustrations. (1) The running of the trains upon a railway constructed under statutory powers caused noise, vibration, and smoke, which depreciated the value of the plaintiff's property. It was held that as the Act had authorised the running of the trains, and as the damage complained of was a necessary result, no action would lie at common law (*z*).

(2) The Metropolitan Asylum District Board were authorised to purchase lands and erect buildings to be used as hospitals. But the Act did not imperatively order these things to be done. The Board erected a small-pox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held that the Board could not set up the statute as a defence (*a*). The Act was construed as meaning that a small-pox hospital might be built and maintained **if it could be done without creating a nuisance,** whereas the Railway Acts are construed to authorise the construction of the railway, whether a nuisance is created or not.

(3) A railway company authorised by statute to use locomotives on their line, set fire to the plaintiff's plantation by sparks emitted from a locomotive. They had used every precaution at that time known to prevent sparks, and had been guilty of no negligence, so they were protected by their statutory authority from liability (*b*). If they had not

(*y*) *London and Brighton Rail. Co.* v. *Truman*, 11 App. Cas. 45, at p. 50.

(*z*) *Hammersmith, etc. Rail. Co.* v. *Brand*, L. R. 4 H. L. 171.

(*a*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193. As to the evidence necessary to sustain a *quia timet* action for an injunction to prohibit a proposed small-pox hospital, see *Att.-Gen.* v. *Manchester Corporation*, [1893] 2 Ch. 87.

(*b* *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679.

had express powers to run locomotives they would have been liable at common law, even though there was no negligence in the use of the locomotive (*c*). But in a later case where sparks set fire to dry clippings negligently left by the railway company on an embankment, and the fire spread thence on to the plaintiff's land and set fire to his crops, it was held that the company was liable, by reason of negligence (*d*). Art. 10.

ART. 11.—*Volenti non fit injuria.*

A person who consents to damage being done cannot bring an action in respect thereof.

(1) The application of this rule to cases where there is express consent is simple. A man who gives another permission to trespass on his land, or to touch his person, cannot afterwards bring an action for such trespass. Thus "leave and licence" is always a good defence to any action for tort. But of course anything done in excess of the leave and licence may be the subject of an action; as, for instance, if I give a man permission to walk on my land, doing no damage, and he does damage.

(2) The rule, however, is more difficult to apply in cases where the person damaged has not definitely consented to the particular act or omission causing the damage, but has voluntarily accepted the risk of damage being done by some act or omission of another. It has been held that if a person trespasses on land in defiance of a warning that there is danger in so doing (in the particular case the danger was from spring guns), he cannot bring an action for damage resulting from that danger (*e*). And the rule has even been extended to apply to cases where a person has accepted the risk of dangers accompanying his employment—such as those arising from the dangerous condition Incurring risk.

(*c*) *Jones* v. *Festiniog Rail. Co.*, L. R. 3 Q. B. 733.

(*d*) *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14, and see the Railway Fires Act, 1905, *post*.

(*e*) *Ilott* v. *Wilkes*, 3 B. & A. 304. See also *Lygo* v. *Newbold*, 9 Ex. 302.

Art. 11.

of the place where he works (*f*). This application of the rule will be better appreciated later, and is fully dealt with in connection with the law of negligence (*g*).

(3) And a person is not disentitled to recover merely because he knows of the existence of danger and takes the risk of incurring it. The amount of the danger and the risks, and all the circumstances, must be taken into account. So where the defendants made a trench in the only outlet from a mews and left only a narrow passage on which they heaped rubbish, and the plaintiff led his horse out of the mews over the rubbish, and it fell into the trench and was killed, it was held to be properly left to the jury whether or not the cabman had persisted contrary to express warning in running upon a great and obvious danger. And the jury having found for the plaintiff, he was entitled to judgment (*h*).

ART. 12.—*To what Extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony.*

(1) Where any unauthorised act or omission is, or gives rise to consequences which make it, a **felony**, and it also violates a private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2) But the policy of the law will not allow the person injured to pursue civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice, and his action will be stayed until the necessary steps have been taken (*i*).

(3) Where the offender has been brought to

(*f*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685.

(*g*) See *post*, Art. 87.

(*h*) *Clayards* v. *Dethick*, 12 Q. B. 439. See the observations of BRAMWELL, L.J., on this case in *Lax* v. *Darlington Corporation*, 5 Ex. D. 28, 35.

(*i*) *Smith* v. *Selwyn*, [1914] 3 K. B. 98.

Art. 12.

justice at the instance of some third person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or a reasonable excuse is shown for his not having been prosecuted, the action will not be stayed (*j*).

N.B.—Remember the rule does not apply—

1. *To misdemeanors.*

2. *Where there is no duty on the part of the plaintiff to prosecute*, as where he is not the person injured by the felony (*k*).

3. *Where the felony was not committed by the defendant*, but by some third person (*l*).

Death caused by felony.

It is expressly provided by Lord Campbell's Act (see *post*, Article 33), that actions for damages brought in respect of the death of any person under that Act shall be maintainable "although the death shall have been caused under such circumstances as amount in law to felony."

Illustrations.

(1) Where, in an action for seduction of the plaintiff's daughter, a paragraph of the claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion; it was held that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute (*m*).

(2) So, where A. has stolen goods, and B. has innocently bought them from A., the owner may bring an action of trover against B., although no steps have been taken to bring A. to justice, for B. is not guilty of felony (*n*).

(*j*) *Smith* v. *Selwyn*, *supra*; *Carlisle* v. *Orr*, [1918] 2 I. R. 442.
(*k*) *Appleby* v. *Franklin*, 17 Q. B. D. 93.
(*l*) *White* v. *Spettigue*, 13 M. & W. 603.
(*m*) *Appleby* v. *Franklin*, 17 Q. B. D. 93; and see also *Osborn* v. *Gillett*, L. R. 8 Ex. 88.
(*n*) *White* v. *Spettigue*, 13 M. & W. 603.

CANADIAN NOTES TO CHAPTER I. OF PART I.

The general principles laid down in the first chapter of the book are for the most part applicable to the eight English law provinces of Canada. In applying them to Canadian cases the student must bear in mind that in many matters the actual rules of the English law have been altered by statute, and, further, that the special circumstances of Canadian life furnish a large number of problems for which there cannot be any exact precedent in the old country. Among the matters which have received special attention from our legislatures may be mentioned defamation, seduction, railways, fire, weeds, automobiles, and suits against the Crown. The special conditions of Canadian life react upon the law of torts chiefly in those parts where it is most closely connected with the law of property. The relation of trespass to possession, for example, becomes a matter of peculiar importance in determining questions relating to the ownership of land in a new country. So again, the English courts have never been compelled to solve problems upon the law relating to ice or to logging rights upon floatable streams.

The reader will understand that the space available for these notes only permits the scantiest reference to these various topics, and that it is not possible for the writer to do more than suggest certain authorities, which will serve to indicate a starting point for the student's own researches. If the reader is newly entering upon the study of law, it is well to take this opportunity of reminding him that the only function of an elementary textbook is to serve as an aid and guide to the study of the original authorities. The student who wishes to become a real lawyer will take no statement either in the text or in the notes upon trust, but will test every dogmatic statement by a careful reference to the authorities upon which it professes to be based.

In the Province of Quebec torts are known by the French technical term of "délits" (Latin *delicta*), which is rather awkwardly translated "offences" in the English version of the Civil Code. The general principles of the law are

summed up in a single sentence (Art. 1053) of the Code, which reads as follows:—

> " Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill."

The detailed application of this principle, which closely follows Article 1382 of the Code Napoléon, has been left to the discretion of the courts, with the result that in Quebec, as in the other provinces, the law of torts mainly rests upon judicial decisions. In the digests of Quebec cases references to Article 1053 will be found under the general heading of " responsabilité." The decisions of the French Courts and the views of the standard commentators upon the French Code are cited as of persuasive, but not of absolutely binding, authority in the Province. In the great majority of cases the common law and the civil law arrive at the same results, but in certain instances, which we shall note as they occur, there is a divergence between Quebec and the other provinces. The Supreme Court of Canada has more than once pointed out that English decisions should only be cited as authority in Quebec cases where it is clear that the legal principle involved is the same in both systems.(*a*)

ARTICLE 1.

The statement in the text about murder as a legal injury needs qualification in Canada. See the notes to Article 12. The statement that a libel upon a dead man gives no right of action to his children is true of the common law provinces, but not in Quebec, where the heirs have a right of action.

ARTICLE 3.

With regard to the illustrations cited from the law of defamation it should be remembered that the rules upon this subject have been to a certain extent modified by provincial legislation. See notes to Article 57.

ARTICLE 4.

For the question of how far actual evil motive is a necessary element in malicious prosecution see the notes on that

(*a*) See *Curley v. Latreille* (1920), 60 S. C. R. 131 at 133.

subject, Article 60. The whole topic is reviewed and the French and English law compared in the judgment of Archambeault, C.J., in *Canadian Pacific Ry. Co.* v. *Waller* (1912), 19 Can. Cr. Cas. 190; 1 D. L. R. 47.

Article 5.

For notes upon the questions raised by this article see the notes to ch. VIII. of Part I. The reader will observe that the case of *Sharp* v. *Powell*, cited in the text, is one of those where the conditions of Canada would compel a different inference to be drawn from the facts. In our winter the water might reasonably have been expected to freeze.

Article 8.

The rule of judicial immunity is really a principle of constitutional law, and is therefore equally applicable to the whole of Canada.

In *McCatherin* v. *Jamer* (1912), 41 N. B. R. 367; 9 D. L. R. 874, the plaintiff, a peddler, was arrested upon a warrant which the magistrate had issued without requiring an information to be laid. The magistrate was held liable in damages.

Various provincial statutes give to constables and other public officers the measure of protection necessary for the due discharge of their duties in good faith. It should, however, be observed that good faith is not by itself a sufficient defence. For example, in Nova Scotia constables are authorised by statute to arrest without warrant persons who are drunk or feign to be drunk. In *Iler* v. *Gass* (1909), 7 E. L. R. 98, the defendant arrested a lady whom he honestly believed to be drunk, but who was in fact perfectly sober and behaving properly. The court awarded her five dollars damages without costs.

Sections 16-68 of the Dominion Criminal Code (R. S. C. c. 146), define the conditions under which judicial and executive officers are exempt from criminal liability for acts done in performance of their duties. The Code does not deal with civil liability, but it may generally be assumed that the provisions of these sections are in conformity with the recognised rules of the common law.

ARTICLE 10.

The general principle of this article is true of the Canadian law, but its application is modified in important respects by the Railway Act (R. S. C., c. 37), and by provincial statutes to the same effect. The railway is compelled to keep its land clear from weeds (s. 296), and from unnecessary combustible matter (s. 297). Furthermore, it is made responsible for fires, irrespective of negligence (s. 298), but its liability for damage caused by fire in any one case is limited to $5,000, provided that it can prove the use of all possible precautions. In the case of injuries to cattle, the burden of proof is cast upon the railway to shew that the accident was due to the negligence or fault of the owner. These rules are, of course, a considerable enlargement of the common law liability.

The following cases may be referred to by way of illustration:—

Rogers v. *Grand Trunk Pacific Ry. Co.* (1912), 22 Man. L. R. 349; 21 W. L. R. 222; 2 D. L. R. 683.

Farquharson v. *Canadian Pacific Ry. Co.* (1912), 20 W. L. R. 914; 3 D. L. R. 258.

Canadian Pacific Ry. Co. v. *Carruthers* (1907), 39 S. C. R. 251.

Rowe v. *Quebec Central Ry.* (1912), 41 Que. S. C. 517; 3 D. L. R. 175.

ARTICLE 12.

The law laid down in this article is no longer applicable to Canada. By section 13 of the Criminal Code (R. S. C., c. 146), it is now enacted that the civil remedy is in no way affected by the fact that the act complained of amounts to a criminal offence. Furthermore, the distinction between felonies and misdemeanours, which is essential to the English rule, no longer exists in Canada (s. 14).

Reference may be made to the following cases:—

E. v. *F.* (1906), 11 O. L. R. 582.

Dunn v. *Gibson* (1912), 20 Can. Cr. Cas. 195.

The only exception to the general rule is to be found in sections 732-734, where it is provided that in cases of common assault the civil remedy is barred by summary conviction of the offender and payment of the fine. For an instance of the application of this rule see:—

Hébert v. *Hébert* (1909), 37 Que. S. C. 339; 16 Can. Cr. Cas. 199.

CHAPTER II.

BREACH OF STATUTORY DUTIES.

ART. 13.—*Breach of Duty created for Benefit of Individuals.*

(1) When a statute creates a new duty **for the benefit of an individual or a class,** and does not provide any special remedy, an action for damages lies for breach of the duty (*a*).

(2) If the statute provides a special remedy, the party injured cannot bring an action for damages (*b*), but he **may have an injunction** unless the statute expressly excludes that remedy (*c*).

Explanation.

Under many Acts of Parliament, local authorities and other public bodies have imposed on them duties for the benefit of the public generally, and a breach of the duty, though it may affect an individual specially, is liable to affect the public at large, or all the persons in a district. Such duties are those which are imposed on sanitary authorities to provide proper systems of sewers, and on gas and water companies to provide gas and water sufficient in quantity and quality. If an individual suffers by breach of these duties, he cannot generally resort to an action, but must proceed by *mandamus*, indictment, or such other remedy as may be available.

It is different, however, where the duty is imposed for the benefit of an individual or a limited class of persons; in

(*a*) *Per* WILLES, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242; applied in *Whittaker* v. *L. C. C.*, [1915] 2 K. B. 676.

(*b*) *Ibid.*

(*c*) *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1901] 1 Ch. 894, approved in *Fraser* v. *Fear*, [1912] W. N. 227.

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such cases a breach of the duty is a wrong to the individual or to each member of the class for whose benefit the duty is created, and a breach of that duty is a tort for which an action for damages will lie, unless the legislature has provided some other remedy, such as a penalty. If a special remedy is provided, that impliedly excludes the remedy by action for damages. But it does not even impliedly exclude the remedy by injunction. Instead of taking the special remedy provided by the statute, the person injured may claim an injunction to restrain threatened breaches of the duty, unless that remedy is expressly excluded by the statute.

In every case, however, it is a question of construction of the statute by which the duty is created. A statute *may* give a remedy by action for breach of a public duty, or may create a private duty and yet say that there shall be no remedy for its breach.

Illustrations.

(1) Under the British Columbia Crown Procedure Act, it is the duty of the provincial secretary to submit to the lieutenant-governor a Petition of Right left with him for that purpose. His definite refusal to do so gave the petitioner a cause of action for damages (*d*).

(2) If an employer is guilty of a breach of a provision in the Factory Acts, by which he is required to fence dangerous machinery, a workman who is injured in consequence thereof, has a cause of action against the employer for such breach (*e*).

ART. 14.—*Breach of Duty created for Benefit of Public.*

(1) When a statute creates a duty **for the benefit of the public,** the possibility or otherwise of a private right of action for the breach of such duty must depend on the scope and language of the statute taken as a whole (*f*),

(*d*) *Fulton* v. *Norton*, [1908] A. C. 451 [P. C.].
(*e*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.].
(*f*) *Dawson* v. *Bingley U. D. C.*, [1911] 2 K. B. 149.

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and the provision of a specific remedy for the breach of duties created by the Act is generally held to exclude other remedies (*g*), and the injury in respect of which action is brought must be of the same kind as that which the statute was intended to prevent (*h*).

Illustration.

A sanitary authority in London failed to perform the duty imposed upon them by s. 29 of the Public Health (London) Act, 1891, of removing street refuse (including snow) from the streets. The plaintiff suffered injuries by a fall caused by snow which the sanitary authority had neglected to remove. It was held that he had no cause of action (*i*).

ART. 15.—*Highway Authorities not Liable for Nonfeasance.*

A highway authority is not liable for damages resulting from mere nonfeasance, *i.e.*, for mere neglect to perform its statutory duty of repairing the highway: but is liable for damage resulting from misfeasance, *i.e.*, for doing something which creates a nuisance in the highway (*k*).

Explanation.

Before the present highway authorities were created by Act of Parliament, the rule was established that a surveyor of highways was not liable for not repairing a highway, the proper remedy being indictment of the inhabitants (*l*). And many recent cases have shown that the same rule is applied to the statutory bodies to whom the duty of repairing highways has been transferred by

(*g*) *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387; cf. *Heath's Garage, Limited* v. *Hodges*, [1916] 2 K. B. 370.

(*h*) *Gorris* v. *Scott* (1874), L. R. 9 Ex. 125.

(*i*) *Saunders* v. *Holborn District Board of Works*, [1895] Q. B. 64.

(*k*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Papworth* v. *Battersea Council*, [1914] 2 K. B. 89.

(*l*) *Russell* v. *Men of Devon*, 2 T. R. 667.

Art. 15.

statute, unless there is anything in the statute to show an intention to make them liable for nonfeasance (*m*). The rule applies also to bridges which are highways (*n*).

Misfeasance.

When a highway authority creates an artificial work in a highway, they will be liable if that work is a nuisance and causes damage to an individual, for the creation of a nuisance is misfeasance. And they may also be liable if by their negligence they allow it to get out of repair so as to become a nuisance, for that is not mere non-repair of the highway. They caused a nuisance actively **by putting the thing there,** if the thing gets out of repair so as to be a nuisance (*o*).

Highway and sanitary authority.

Sometimes the same local body is both highway authority and sanitary authority, and in their capacity of sanitary authority they may put in the highway a manhole or grating for sewers. If this thing gets out of repair by reason of their *negligence* (but not otherwise), they are liable (*p*). But if it becomes a nuisance by reason of the surface of the roadway getting worn down round it, whilst the thing itself is not out of repair, they are not liable. Not as highway authority, for their only breach of duty is not repairing ; and not as sanitary authority, for the thing they have put there is not out of repair, and they have been guilty of no negligence (*q*).

Illustrations.

(1) A highway authority removed a fence which their predecessors had erected to protect the public from a dangerous ditch. A man driving along the road drove into the ditch, and was drowned. Removing the fence was misfeasance, and the highway authority was liable (*r*).

(*m*) *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524 [P. C.] ; *Gibraltar Sanitary Commissioners* v. *Orfila*, 15 App. Cas. 400 [P. C.] ; *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433.

(*n*) *Russell* v. *Men of Devon*, *ante* ; *M'Kinnon* v. *Penson*, 8 Ex. 319 ; *Davis* v. *Bromley Corporation*, [1908] 1 K. B. 170.

(*o*) *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256 [P. C.] ; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590.

(*p*) See *ante*, Art. 11.

(*q*) *Thompson* v. *Brighton Corporation*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q. B. 332.

(*r*) *Whyler* v. *Bingham Rural District Council*, [1901] 1 Q. B. 45.

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(2) An urban authority lawfully made a manhole in the street. The cover was properly made and in good order, but the surface of the road was allowed to wear down so that the cover projected above the surface. The plaintiff's horse stumbled over this, and was injured. The only breach of duty was not repairing the surface of the road, and this was nonfeasance, for which the council was not liable (*s*).

(3) By the negligence of a person employed by the defendants, the highway authority of Canterbury, a heap of stones was left by the side of a road without a light. The plaintiff, driving by in the dark, was upset by it and injured. The negligence consisted in putting the heap of stones by the roadside, and this was misfeasance for which the defendants were liable (*t*).

(4) A local authority was under a statutory obligation to light the streets in its area. The nearest light to a dangerous arch was 70 feet away. A driver of a cart was killed in attempting to pass under the arch. The Court held the place was inadequately lighted and the authority liable in damages to the widow on the ground that it had done negligently an act it was authorised by statute to do (*u*).

(*s*) *Thompson* v. *Brighton Corporation, supra.*

(*t*) *Foreman* v. *Canterbury Corporation*, L. R. 6 Q. B. 214.

(*u*) *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K. B. at p. 199, following *Geddis* v. *Bann Reservoir Proprietors* (1878), App. Cas. 430.

CANADIAN NOTES TO CHAPTER II. OF PART I.

Article 13.

In *Stewart* v. *Steele* (1912), 5 Sask. L. R. 358; 22 W. L. R. 6; 2 W. W. R. 902; 6 D. L. R. 1, a case of an automobile accident, the defendant had failed to observe the safety requirements prescribed by the provincial statute. The court held the non-observance to be in itself evidence of negligence.

In *Love* v. *New Fairview Corporation* (1904), 10 B. C. R. 330, a fire broke out in a hotel which was not equipped with the fire escape appliances prescribed by statute. The statute provided a penalty for non-compliance with its provisions. The plaintiff delayed his own exit in order to rescue a fellow-guest and suffered injury through lack of a proper means of escape. It was held that he was entitled to damages. An attempt was made to plead the defence of *volenti non fit injuria*, since the plaintiff had resided in the hotel with full knowledge of the facts, but the court held that this defence did not apply in a case of non-compliance with a statutory duty.

Article 14.

Canadian authority on the whole leans to the view that any breach of statutory duties gives a right of action to persons injured thereby, unless the statute indicates some particular form of remedy.

In *Halifax Street Ry. Co.* v. *Joyce* (1893), 22 S. C. R. 258, the company violated a statutory obligation to keep their rails level with the street, and the plaintiff's horse tripped in the raised rail. It was held, affirming the judgment of the Supreme Court of Nova Scotia, that the plaintiff was entitled to damages.

In *Little* v. *Smith* (1914), 32 O. L. R. 518; 20 D. L. R. 399, the defendant had been cutting ice on a lake, and left the hole unguarded in disregard of section 287 of the Criminal Code, which penalises such an offence. The

plaintiff's horse bolted and fell into the hole, which was at some distance from the trodden road across the ice. It was held that the defendant was liable in damages.

ARTICLE 15.

It is difficult to see any logical reason for the distinction which the English courts have drawn between "misfeasance" and "nonfeasance," and in Canada the difference has now been largely obliterated by provincial statutes. It is now generally true to say that municipalities are liable for accidents arising from the non-repair of the streets under their control. In several cases this liability has been held to extend to accidents caused by ice being allowed to remain in a slippery state upon the streets and sidewalks.

The following cases may be referred to:—

Tuohey v. *City of Medicine Hat* (1912), 10 D. L. R. 691; 5 Alta. L. R. 116; 23 W. L. R. 880 (ice on the sidewalk).

La Cité de Montréal & Ryan v. *Guaranteed Pure Milk Co* (1907), 17 Que. K. B. 143 (defective street lighting).

In the absence of statutory provision the common law rule, as stated in the text, still holds good: *Cullen* v. *Town of Glace Bay* (1913), 46 N. S. R. 215.

CHAPTER III.

RELATION OF CONTRACT AND TORT.

ART. 16.—*Distinction between Actions for Tort and for Breach of Contract.*

(1) If the cause of complaint is for breach of a contractual duty (that is to say, is for an act or omission which would not give rise to any cause of action without proof of a contract), the action is one of contract.

(2) But if the relation of the plaintiff and the defendant be such that a duty arises from the relationship, irrespective of contract, for a breach of that duty the remedy is an action of tort (*a*).

Comment.

Formerly a plaintiff had to be careful to frame his action either in tort or in contract, and the rule then was that if the act or omission complained of was both a breach of duty arising apart from contract, and a breach of contract, the plaintiff might sue in contract or tort (*b*). Each party states the facts on which he relies, and if on those facts the plaintiff could have recovered in any form of action prior to 1875, he can now recover in the action which he has brought. The distinction between tort and contract is chiefly of importance upon the question of the amount of costs recoverable (*c*). The rule is that where the wrong is in substance a tort, the plaintiff cannot merely by suing

(*a*) See *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.], *per* A. L. SMITH, L.J., at p. 947: *Turner* v. *Stallibrass*, [1898] 1 Q. B., at p. 58.

(*b*) *Brown* v. *Boorman*, 11 Cl. & F. 1.

(*c*) See County Courts Act, 1888, s. 116, and County Courts Act, 1903, s. 3. And as to the power of transfer from one Court to another, see ss. 1–12 of the County Courts Act, 1919.

Art. 16. in contract entitle himself to a larger measure of damages (*d*).

Illustrations. (1) A railway company owes to a passenger, irrespective of any contract, a duty to take care. The taking of a ticket also constitutes a contract to carry. If the servants of the railway company are negligent, whether by acts of omission or by acts of commission, the cause of action is in substance a tort, being a breach of a duty arising irrespective of contract, although in form the action might be framed as a breach of contract (*e*).

(2) A person who takes in a horse under a contract of agistment, impliedly undertakes not to be negligent in respect of the horse. But as he is a bailee for reward, the same duty to take care arises irrespective of the contract, and an action for not taking care is in substance an action of tort for negligence (*f*). So in all cases of actions between bailor and bailee, if the duty arises out of the bailment at common law, a breach of that duty gives rise to an action for tort; but if the duty only arises out of a contract between the parties, and would not apart from such contract arise from the mere relationship of bailor and bailee, a breach of the duty is properly the subject of an action for breach of contract (*g*).

ART. 17.—*Privity not necessary where the Remedy is in Tort.*

When something done in pursuance of a contract between two persons gives rise to a relationship between one of them and a third person, such that the one owes a duty to the third person, irrespective of the contract, the

(*d*) *Chinery* v. *Viall*, 5 H. & N. 295; *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K. B. 244.

(*e*) *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.]; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.].

(*f*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.].

(*g*) *Ibid.*, at p. 59, *per* COLLINS, L.J.

third person cannot sue on the contract because he is not privy to it, but he can sue in tort for breach of the duty arising, irrespective of the contract. But the grounds and extent of liability under a duty apart from contract are not clearly deducible from the recent cases. (See Salmond on Torts, 5th ed., pp. 425-435.) Art. 17.

Illustrations.

(1) A man employs a surgeon to attend his wife or his infant son. By reason of the surgeon's negligence, the patient is injured. There is a contract between the man who calls in the surgeon and the surgeon, but none between the surgeon and the patient. But irrespective of the contract, the surgeon owes a duty to take care by reason of the relationship of surgeon and patient. And for breach of this duty the patient can sue in tort (*h*).

(2) A passenger by train lost his luggage by reason of the negligence of the company's servants. The passenger's fare had been paid by his master. There was accordingly no contract between the passenger and the railway company—nevertheless the company were as bailees bound to take care of the passenger's luggage, and for breach of that duty the passenger could sue in tort (*i*).

(3) Again, where the defendant sold to A. a hair-wash, *to be used* by *A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A.'s wife, it was held that she had a good cause of action against the defendant, for the hairdresser owed A.'s wife a duty, irrespective of contract, not to send out for her use a dangerous hair-wash (*k*).

(4) But when no duty, irrespective of contract, can be shown, a person who is injured by another's negligence in carrying out a contract has no cause of action. Thus, in *Le Lievre* v. *Gould* (*l*), mortgagees lent money by instal-

(*h*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Pippin* v. *Sheppard*, 11 Price, 400.

(*i*) *Marshall* v. *York, Newcastle and Berwick Rail. Co.*, 11 C. B. 655, and see *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387 [C. A.].

(*k*) *George* v. *Skivington*, L. R. 5 Ex. 1. Dissented from in *Blacker* v. *Lake & Elliot* (1912), 106 L. T. 533.

(*l*) [1893] 1 Q. B. 491 [C. A.].

Art. 17.

ments to a builder, on the faith of certificates negligently granted by the defendant, who was a surveyor appointed, not by the mortgagees, but by the builder's vendor. The certificates were inaccurate, and the mortgagees thereby suffered loss, for which they claimed compensation from the defendant:—*Held*, that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs, and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun or a poisonous hair-wash, and that on that ground the defendant was liable; but the court would not admit the analogy. Of course, however, if the certificate had been *fraudulent*, *i.e.*, issued with intent to deceive the plaintiffs, then, independently of any contractual relation, the defendant would have been liable in an action of deceit.

(5) So, too, when A. built a coach for the Postmaster-General, B. horsed it and hired C. to drive it, the coach broke down from a defect in its construction, and C. was consequently injured, it was held that A. **owed no duty to C. apart from contract,** therefore C. could not sue A. in tort. Nor, of course, could C. have sued A. in contract, as C. was no party to the contract between A. and B., and A. was no party to the contract between B. and C. (*m*).

(6) A wholesale druggist sold to a retailer a dangerous drug bearing a false label. The retailer sold it to a doctor who sold it to a patient, and the latter took it on the faith of the label and was thereby injured. Despite the absence of privity the court held the wholesale druggist liable to the injured party (*n*).

ART. 18.—*Duties gratuitously undertaken.*

When a person gratuitously undertakes to perform any service for another, then, although no action will lie for not performing the service

(*m*) *Winterbottom* v. *Wright*, 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253 [C. A.].

(*n*) *Thomas* v. *Winchester* (1852), 6 New York 397, approved in *Dominion Natural Gas Co.* v. *Collins*, [1909] A. C. 640. See Art. 82, *post*.

(there being no consideration for the promise), yet an action will lie for negligence in the performance of it (*o*). Art. 18.

A duty to take care may arise apart from any contract whatever, and for breach of that duty the remedy is an action of tort.

(1) Thus, in *Coggs* v. *Bernard*, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance. The ground of this liability appears to be the duty to take care which arises from the owner having entrusted his property to the defendant. Illustrations.

(2) In *Doorman* v. *Jenkins* (*p*) a keeper of a coffee-house gratuitously undertook the custody of money for a customer. It was lost whilst in his care by his negligence. He was held liable in an action for breach of the duty to take care arising from his becoming bailee of the money.

(3) Where the plaintiff was invited by the defendants' servant to ride on an engine, and he did so for his own convenience, and was injured by the negligence of the defendants' servants, the defendants were held liable; as by gratuitously undertaking to carry the plaintiff, the defendants came under a duty to exercise care, and they were liable in an action of tort for breach of that duty (*q*).

(4) As to chattels loaned gratuitously, the duty of the lender is to disclose any dangerous quality of which he actually knows (*r*).

(*o*) *Coggs* v. *Bernard*, 1 Sm. L. C. 177.

(*p*) 2 A. & E. 256.

(*q*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219 [C. A.], followed in *Karavias* v. *Callinicos*, [1917] W. N. 323 [C. A.].

(*r*) *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

CANADIAN NOTES TO CHAPTER III. OF PART I.

Articles 16 and 17.

The principle of *Dominion Natural Gas Co.* v. *Collins* (1909), A. C. 640, has been repeatedly applied in the Canadian courts. In general it may be said that those who manufacture dangerous articles or install dangerous machinery are under a liability in tort for injuries caused by negligent manufacture or installation to those who may reasonably be expected to come in contact with the danger.

In *Nokes* v. *Kent Co., Ltd.* (1913), 4 O. W. N. 665; 9 D. L. R. 772, the defendants were not the manufacturers of the defective machinery, but had purchased it from the manufacturers and installed it on the premises of the plaintiff's employers. It was held that they were liable for an injury caused to the plaintiff in operating the machine, since the defect was one within the knowledge of the defendants.

In *Great North-Western Telegraph Co.* v. *Dominion Fish and Fruit Co.* (1915), 25 Que. K. B. 230, the telegraph company by mistake delivered an important cablegram to a trade competitor of the plaintiff company instead of to the plaintiffs, who thereby were prevented from concluding a valuable contract. The court unanimously held that the telegraph company was delictually liable. This decision would appear to be in direct conflict with the English case of *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, where it was held that the company owes no duty to the addressee of a telegram. The weight of authority on this continent, though not entirely unanimous, favours the view taken by the Quebec Court of King's Bench. It may be observed that the duty of rendering an efficient service to the public is imposed upon the telegraph company by its charter, so that the case could equally well have been decided in favour of the plaintiffs upon the principles laid down in Articles 13 and 14 of the text.

In *Buckley* v. *Mott* (1919), 50 D. L. R. 408, the plaintiff was injured by eating powdered glass, which had got

into chocolate in the course of manufacture. The chocolate was purchased from a retailer, but the action was brought against the manufacturer for negligence. Drysdale, J., held that the plaintiff was entitled to succeed. The case would appear to be in conflict with the decision of an English Divisional Court in *Blacker* v. *Lake and Elliott* (1912), 106 L. T. 533. The various authorities are by no means easy to reconcile, but it is submitted that *Buckley* v. *Mott* is in harmony with the true principle of liability for negligence: the manufacturer contemplates the use of his product by the public, and it is reasonable to demand that he should exercise diligence to protect the consumers from injury.

ARTICLE 18.

The proposition stated in the text seems to go farther than the existing cases warrant. The decisions cited by the learned author do not, I would submit, justify us in saying more than that:—

(1) A gratuitous bailee is liable for gross negligence in the care of the goods entrusted to him, *i.e.*, only for the neglect of the most obvious precautions, and not merely for the failure to exercise the maximum degree of care required of a careful warehouseman. This was laid down by the Privy Council in *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317, and followed by Riddell, J., in *Carlisle* v. *Grand Trunk Ry. Co.* (1912), 25 O. L. R. 372; 1 D. L. R. 130.

(2) The owner of property is bound to exercise care towards those whom he invites to enter upon or to use his property, even though the invitation be gratuitous. But he is only liable for what may be called "active negligence," such as leaving open dangerous "traps" or pitfalls, and the licensee must otherwise take the premises or property as he finds them, however defective they may be. See *King* v. *Northern Navigation Co.* (1912), 27 O. L. R. 79; 6 D. L. R. 60; *Nightingale* v. *Union Colliery Co.* (1904), 35 S. C. R. 65.

(3) A person voluntarily assuming duties which demand special or technical skill is bound to act up to the degree of skill which he professes.

(4) An agent who gratuitously enters upon the performance of services for another is only liable if he fails to exercise the same care as he exercises in his own affairs. Thus in *Shields* v. *Blackburne* (1789), 1 Hy. Bl. 159, a merchant voluntarily undertook to pass a customs entry for another's parcel along with his own. By mistake he entered both parcels under a wrong denomination, with the result that both were seized. The court held that he was not liable for the loss.

In *Baxter* v. *Jones* (1903), 6 O. L. R. 360, an insurance agent gratuitously undertook to effect an additional insurance on the plaintiff's property, and to notify the other companies concerned. He was held liable for loss occasioned by his failure to give the notice, but the decision can be placed on a contractual ground, since the undertaking of the business was in his interest as an insurance agent, and consideration was therefore present.

The old Newfoundland case of *Young* v. *Attwood* (1821), 1 Nfld. 233, is another instance in which the defendant neglected a gratuitous promise to insure. The court held that he was not liable, but some uncertainty as to the exact terms of the promise makes the case of little value as an authority.

Article 1710 of the Quebec Code, following Article 1992 of the Code Napoléon, defines the law somewhat vaguely:—

> "The mandatory is bound to exercise, in the execution of the mandate, reasonable skill and all the care of a prudent administrator. Nevertheless, if the mandate be gratuitous, the court may moderate the rigour of the liability arising from his negligence or fault, according to the circumstances."

Mandate, whether gratuitous or not, gives rise to a contractual obligation in Quebec, since the civil law does not regard "consideration," in the technical English sense, as essential to the formation of a contract.

CHAPTER IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

ART. 19.—*Torts committed Abroad.*

AN action will lie in the English Courts for a tort committed outside England, provided:

(a) It is actionable according to English law and not justifiable according to the law of the country where it was committed (*a*); and

(b) It is a tort which is not of a purely local nature, such as a trespass to, or ouster from, land, or a nuisance affecting hereditaments, for to such torts the *lex situs* or law of the country in which the property lies applies and English courts will not administer this law.

Note, that in order to comply with paragraph (a) it is not necessary that the tort should be **actionable** according to the law of the country where the act was committed, provided that it is **not justifiable** by that law; that is to say, that it is an act in respect of which civil or **criminal** proceedings may be taken in that country.

Illustrations.

(1) Thus, in the leading case of *Mostyn* v. *Fabrigas* (*b*) it was held that an action lay in England against the governor

(*a*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.]: *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176. As to the Admiralty jurisdiction for damages from collision on the high seas or in foreign waters and where both ships were foreign, see *The Invincible*, 2 Gall. 29, and *The Diana* (1862), Lush. 541.

(*b*) 1 Sm. L. C. 591.

Art. 19. —— of Minorca for a false imprisonment committed by him in Minorca, the plaintiff being a native Minorquin.

(2) Some ammunition, which was British property, was seized on board a British ship by an officer of the British Navy in territorial waters of Muscat. The seizure was justifiable in Muscat under a proclamation of the Sultan of Muscat. It was held that no action lay for the seizure (*c*).

(3) So an action will lie in this country for a libel contained in a pamphlet in the Portuguese language and published in Brazil, even though libel be not actionable in Brazil, provided it be not justifiable in Brazil, *i.e.*, it is enough if it be punishable in Brazil (*d*).

(4) The English courts have no jurisdiction to entertain an action to recover damages for trespass to land situate abroad; injuries to proprietary rights in foreign real estate being outside their jurisdiction. So the courts have recently refused to try a case of trespass to lands in South Africa (*e*).

(*c*) *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

(*d*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.].

(*e*) See *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, where the earlier cases are examined.

CANADIAN NOTES TO CHAPTER IV. OF PART I.

Article 19.

In *Dupont* v. *Quebec S. S. Co.* (1896), 11 Que. S. C. 188, the defendant company was incorporated under a Dominion charter with its head office in Quebec, and the plaintiff's husband was its employee. He was killed by an accident on board one of the company's ships at Trinidad, the ship being registered in England. The trial judge dismissed the action on the ground that the case was governed by the law of Trinidad, where *actio personalis moritur cum persona*. The Court of Review reversed this judgment, holding (i) that the ship must be regarded as English territory (ii) that the English defence of "common employment" was not available to the defendants. The doctrine of common employment, as Andrews, J., pointed out, rested on an implied contract, and the contract between the deceased and the company was obviously intended to be governed by Quebec law. That being so, the defendant company was liable under the law of Quebec.

The differences in the various provincial Workmen's Compensation Acts have given rise to several cases. Reference may be made to *Story* v. *Stratford Mill Building Co.* (1913), 30 O. L. R. 371; 18 D. L. R. 309.

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 20.—*Who may sue.*

(1) Every person may maintain an action for tort, except an alien enemy, or British subject adhering to the King's enemies (*a*), and a convict (sentenced to death or penal servitude) during his incarceration (*b*).

(2) A married woman may sue alone, and any damages recovered are her separate property (*c*).

(3) A husband cannot sue his wife in tort (*d*).

(4) A wife can sue her husband in tort "for the protection and security of her own separate property"; but cannot sue him otherwise in tort (*d*).

(5) A corporation cannot sue for a tort merely affecting its reputation, such as a libel charging the corporation with corrupt practices (*e*); unless (a) th statement would have been defamatory of an individual, and (b) it

(*a*) See *De Wahl* v. *Braune*, 1 H. & N. 178; *Netherlands South African Rail. Co.* v. *Fisher*, 18 T. L. R. 116.

(*b*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 30.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; *Beasley* v. *Roney*, [1891] 1 Q. B. 509.

(*d*) *Phillips* v. *Barnet*, 1 Q. B. D. 436; and 45 & 46 Vict. c. 75, s. 12; *Hulton* v. *Hulton*, [1917] 1 K. B. 813.

(*e*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

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tends to cause actual damage to the corporation with regard to its business or property (*f*).

NOTE.—At common law husband and wife could not sue each other at all, nor could a married woman sue anyone without joining her husband as plaintiff. Now a married woman can sue alone anyone but her husband. She can also sue her husband for the protection and security of her separate property; but no corresponding right is given to him. If a husband claims possession of property from his wife he must proceed by originating summons to have the question determined in a summary manner by a judge (*g*).

Unborn child.

It is doubtful whether an action can be brought for injuries suffered by the plaintiff whilst he was still *en ventre sa mère*. It has been held in Ireland that an action for negligence would not lie in such circumstances (*h*), but it has been held in England that where a man was killed by negligence his child, unborn at the time of the accident, might claim damages under Lord Campbell's Act (*i*).

Alien enemy.

As to who is an alien enemy see the cases cited below (*j*).

ART. 21.—*Who may be sued for a Tort.*

(1) Every individual who commits a tort is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind; except (i) the sovereign, (ii) foreign sovereigns, and (iii) ambassadors of foreign powers (*k*). But foreign sovereigns and ambassadors can waive their privilege (*l*).

(*f*) *South Hetton Coal Co.* v. *N. E. News Association*, [1894] 1 Q. B. 133.

(*g*) Married Women's Property Act, 1882, ss. 12, 17.

(*h*) *Walker* v. *Great Northern Rail. Co.*, 28 L. R. Ir. 69.

(*i*) *The George and Richard*, L. R. 3 Ad. & E. 466.

(*j*) *Porter* v. *Freudenberg*, [1915] 1 K. B. 857; *Scotland* v. *South African Territories* (1917), 33 T. L. R. 255; *Schaffenius* v. *Goldberg*, [1916] 1 K. B. 284.

(*k*) See *Magdalena Co.* v. *Martin*, 28 L. J. Q. B. 310.

(*l*) *Duke of Brunswick* v. *King of Hanover*, 6 Bea. 1.

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(2) A corporation which commits a tort is as liable to be sued as a private individual would be. The test of liability for the torts of its servants or agents is the fact of authority or ratification by the directing body of the company (*m*). The doctrine of *ultra vires*, usually based as to a company's torts on the decision in *Poulton* v. *L. & S. W. Ry. Co.* (*n*), is, it is submitted, only applicable to negative *implied* authority to do acts *ultra vires*, and cannot affect liability for acts expressly authorised.

(3) No action for tort can be brought against a trade union.

Illustrations.

Infants.

(1) Thus, if an infant hires a horse he is liable in an action of negligence for immoderately riding the horse, for, as bailee, he is bound to take care of the horse, and the breach of that duty is a tort (*o*). But he would not be liable in an action of *contract* founded on the hiring (*p*).

(2) An infant, however, cannot be sued in tort if such an action would be only an indirect way of enforcing a contract on which he is not liable. So if goods (not being necessaries) are delivered to him under a contract of sale and he does not pay for them, he cannot be sued for converting them to his own use, for that would be only another way of recovering the price (*q*). Nor, if an infant induces another to contract with him by representing that he is of age, can he be sued in an action for deceit, for that would be only another way of recovering damages for breach of the contract (*r*).

(*m*) *The National Bank* v. *Graham* (1879), 100 U.S. 702; *Salt Lake City* v. *Hollister* (1885), 118 U. S. 260; and see Salmond on Torts, 5th ed., pp. 66–68.

(*n*) (1867), L. R. 2 Q. B. 534.

(*o*) *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45, followed in *Walley* v. Holt, 35 L. T. 631.

(*p*) *Jennings* v. *Rundall*, 8 Term Rep. 335.

(*q*) *Per cur.* in *Manby* v. *Scott*, 1 Sid. 109 [Ex. Ch.].

(*r*) See *Johnson* v. *Pie*, 1 Keble, 905, 913; *Bartlett* v. *Wells*, 1 B. & S. 836.

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Lunatics.

(3) There is not much authority upon the liability of *lunatics* for their torts. KELLY, C.B., says lunacy is no defence in an action for a wrong, as libel or assault (*s*). But ESHER, M.R., suggests that his liability in libel depends on "whether he is sane enough to know what he is doing" (*t*). Lord KENYON points out in *Haycroft* v. *Creasy* (*u*) the distinction between answering *civiliter et criminaliter* for acts injurious to others. "In the latter case the maxim applied *actus non facit reum nisi mens sit rea*, but it was otherwise in civil actions where the intent was immaterial if the act done were injurious to another." And no doubt a lunatic is generally liable in tort (*v*).

Colonial governors.

(4) A governor of a colony is not a sovereign. He may be sued for tort in the courts of his own colony or in this country (*w*).

Corporations.

(5) With regard to corporations, of course actions of tort can of necessity only arise for acts or omissions of their directors or servants, and the difficulty in such cases is the same as arises in other cases of the responsibility of a principal for the acts of his agent, viz., the difficulty of determining whether or not the act or omission complained of was within the scope of the general authority or duty of such servant or director (*x*).

It was long doubtful whether a corporation aggregate could be sued in an action of malicious prosecution. It was thought that a corporation, having no mind, could not act maliciously (*y*). But it is now settled that a corporation may be made liable for malicious prosecution if in

(*s*) *Mordaunt* v. *Mordaunt*, L. R. 2 P. & D. 102, 142.

(*t*) *Emmens* v. *Pottle*, 16 Q. B. D. 354, 356 [C. A.].

(*u*) 2 East, 92, at p. 104.

(*v*) See also *per* ESHER, M.R., in *Hanbury* v. *Hanbury*, 8 T. L. R. 559 [C. A.], at p. 560.

(*w*) *Mostyn* v. *Fabrigas*, 1 Cowp. 161; *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; *Musgrave* v. *Pulido*, 5 App. Cas. 102; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

(*x*) See Chapter VI.

(*y*) See Lord BRAMWELL'S opinion in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

instituting the proceedings it is actuated by motives which in an individual would be malice (*z*). Art. 21.

And, on the same principle, a corporation may be liable for publishing a libel on a privileged occasion. Though a corporation cannot itself be guilty of actual malice, it is liable if its agent in publishing the libel is actuated by malice (*a*).

(6) Trade unions registered under the Trade Union Acts, 1871 and 1876, are associations of masters or of workmen empowered to hold property, and with limited powers of suing and being sued in contract. Trade unions.

It was held in the famous Taff Vale Case (*b*) that there was nothing in these Acts to prevent an action for tort being brought against a trade union, and after that decision many such actions were brought until the Trades Disputes Act, 1906 (*c*), was passed. That Act provides (*inter alia*) that an action shall not be entertained by any court (a) against a trade union, or (b) against any members or officials of a trade union (on behalf of themselves and all other members of the union) in respect of any tortious act alleged to have been committed by or on behalf of the union. This gives trade unions complete immunity from actions of tort.

ART. 22.—*Joint Tort-feasors.*

(1) Persons who jointly commit a tort may be sued jointly or severally ; and if jointly, the damages may be levied from both or either (*d*).

(2) A judgment against one of several joint tort-feasors is a bar to an action against the

(*z*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392, following *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287.

(*a*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.

(*b*) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

(*c*) 6 Edw. 7, c. 47.

(*d*) *Hume* v. *Oldacre*, 1 Stark. 351 ; *Blair and Sumner* v. *Deakin*, *Eden and Thwaites* v. *Deakin*, 57 L. T. 522.

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others, even although the judgment remains unsatisfied (*e*).

(3) A release of one of several joint tort-feasors is a bar to an action against the others (*f*); but a mere covenant not to sue one of them is not (*g*).

(4) If damages are levied upon one only, then (a) where the tort consists of an act or omission, the illegality of which he must be presumed to have known, he will have no right to call upon the others to contribute (*h*). But (b) where the tort consists of an act not obviously unlawful in itself (*e.g.*, trover by a person from whom the same goods are claimed by adverse claimants), he may claim contribution or indemnity against the party really responsible for the tort; and this right is not confined to cases where he is the agent or servant of the other tort-feasor (*i*).

NOTE.—When two or more persons join in committing a tort, each is responsible for the whole of the injury sustained by their common act. To constitute two persons joint tort-feasors, they must act together in furtherance of a common design, or one must aid, counsel, or direct the other. If two persons acting quite independently contribute by their separate acts to the same damage, they are not joint tort-feasors. So, too, persons independently repeating the same slander, or independently making a noise or obstruction which is a nuisance, are not joint tort-feasors (*k*).

(*e*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.].

(*f*) *Cocke* v. *Jennor*, Hob. 66; *Howe* v. *Oliver* (1908), 24 T. L. R. 781.

(*g*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511 [C. A.].

(*h*) *Merryweather* v. *Nixan*, 8 Term Rep. 186. But this does not apply to general average contribution; see Maritime Conventions Act, 1911, s. 3, and *Austin Friars SS. Co., Ltd.* v. *Spillers & Bakers, Ltd.*, [1915] 3 K. B. 586.

(*i*) *Adamson* v. *Jarvis*, 4 Bing. 66, 72; *Betts* v. *Gibbins*, 2 A. & E. 57; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208.

(*k*) See *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450.

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One cause of action.

Against two or more joint tort-feasors there is only **one cause of action,** and if that cause of action is **released** or **merged in a judgment,** no second action can be brought. So where A. and B. jointly converted C.'s piano to their own use, and judgment was recovered in an action against A. only, no further action could be brought against B., although the judgment against A. was unsatisfied. A. or B. might have been sued jointly in the first action, and then C. might have enforced the judgment against either of them (*l*).

Partners.

When a partner in a firm acting in the ordinary course of the business of the firm, or with the authority of his co-partners, commits a tort in regard to any third person, all the partners are jointly liable. Each member of the firm is also severally liable (*m*).

(*l*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.].
(*m*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 10, 12.

CANADIAN NOTES TO CHAPTER V. OF PART I.

Article 20.

Statutes similar to the English Married Women's Property Act have now been passed by all the common law provinces, with the results indicated in the text. On this subject see the next chapter, and notes thereto.

In *Macgregor* v. *Macgregor* (1899), 6 B. C. R. 432, the plaintiff was bringing an action of replevin in order to recover some furniture detained by his wife. The court held that the action was one of tort and therefore not maintainable.

With regard to alien enemies a proclamation issued by the Dominion Government at the outbreak of the European war extended protection to all citizens of enemy countries residing in Canada, so long as they continued to behave themselves properly. Numerous decided cases have held that the civil rights of such aliens remain unimpaired, even where the party is interned. Reference may be made to *Topay* v. *Crow's Nest Pass Coal Co.* (1914), 20 B. C. R. 235; 18 D. L. R. 784, and *Harasymczuk* v. *Montreal Light, Heat & Power Co.* (1916), 25 Que. K. B. 252.

For a case illustrating the right of a corporation to sue for libel see *Chinese Empire Reform Association* v. *Chinese Daily Newspaper Publishing Co.* (1907), 13 B. C. R. 141.

Article 21.

This article needs considerable qualification in view of the present Canadian law.

The Exchequer Court of Canada has now jurisdiction to hear and determine:—

> "Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

This is the result of section 20 of the Exchequer Act (R. S. C. c. 140) as amended by 7-8 Geo. V. c. 23, s. 2. In its original form the rule limited the public liability to cases of accidents caused by negligence "on any public work." The new rule seems to place the liability of the Crown upon the same footing as that of any other employer, so far as the law of negligence is concerned. The law applicable is that of the province where the accident occurs.

The court has also jurisdiction over:—

> "Every claim against the Crown for damage to property injuriously affected by the construction of any public work." (R. S. C. c. 140, s. 20-*b*).

In cases not covered by the statutes the common law rule still holds good: *Bonneau* v. *The King* (1917), 18 Can. Ex. R. 135.

The question of the civil liability of lunatics is one of some difficulty in common law jurisdictions. In *Stanley* v. *Hayes* (1904), 8 O. L. R. 81, a lunatic was held liable for setting fire to a barn. The evidence shewed that he had some kind of notions of right and wrong.

In *Brennan* v. *Donaghy*, 19 N. Z. L. R. 289, the New Zealand Court of Appeal held a lunatic civilly liable for an assault after he had been acquitted on the ground of lunacy in a criminal court. A similar decision was reached in New York in *Williams* v. *Hays* (1894), 143 N. Y. 442; 42 Am. St. Rep. 743. On the other hand, an insane defendant has been held not liable for slander, where the slander was itself prompted by her insane delusions: *Irvine* v. *Gibson* (1904), 117 Ky. 306; 4 Ann. Cas. 569.

In France the Cour de Cassation held in 1866 that insanity was a complete defence: *Nadau* v. *Delclaux,* Sirey 1866-i-237, Dalloz 1867-i-296. This decision has been generally, though not quite unanimously, followed by the French courts. See Fuzier-Hermann, iii. 770.

Article 1053 of the Quebec Code amplifies the Code Napoléon (Art. 1382), and now reads: "Every person *capable of discerning right from wrong* is responsible," etc. The addition of the words in italics would seem to make it clear that a lunatic cannot be liable in Quebec, at any rate if his lunacy is relevant to the act which causes damage.

Infants are liable in tort, but their liability will be measured by the standards appropriate to their age and intelligence: *Briese* v. *Maechtle* (1911), 146 Wis. 189; 130 N. W. 893; Ann. Cas. 1912-C. 176. The same rule holds good in Quebec (C. C., Art. 1007).

The statutory exemption of trade unions from liability in tort has not been imitated in Canada. On the other hand, in *Williams* v. *Local Union, etc.* (1920), 59 S. C. R. 240, a majority of the Supreme Court held that an action for conspiracy was only maintainable against the individual member of an unincorporated union. See notes to Articles 71-72.

ARTICLE 22.

For a Canadian case illustrating the law of joint tort-feasors, see *Longmore* v. *The J. D. McArthur Co.* (1919), 43 S. C. R. 640.

The doctrine of *Brinsmead* v. *Harrison* has not been generally adopted in the United States.

The liability of joint wrong-doers is joint and several under the Quebec law (C. C. Art. 1106), but legal proceedings taken against one are no bar to similar proceedings against the others (Art. 1108).

CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

SECTION I.—LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 23.—*Wife's ante-nuptial and post-nuptial Torts.*

(1) A married woman may be sued alone in respect of her ante-nuptial torts. Her husband is also liable to the extent of the property which he received with her; and he may be sued either jointly with her or alone (*a*).

(2) A married woman may also be sued alone in respect of her *post-nuptial* torts (*b*), but her husband is also liable, and may be joined with her as defendant (*c*).

(3) The liability of a husband for his wife's torts comes to an end by the death of the wife, or by divorce or judicial separation (*d*), or during the operation of a separation order under the Married Women's (Summary Jurisdiction) Act, 1895, s. 6. But a voluntary

(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 13–15. As to antenuptial debts of the wife, see *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*b*) *Ibid.*, s. 1.

(*c*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 1 Ch. 203.

(*d*) Matrimonial Causes Act, 1857, s. 26.

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separation by deed does not affect the husband's liability (*e*).

Before the Married Women's Property Act, 1882, a wife could not be sued alone for a tort. Her husband was necessarily joined as defendant in an action of tort brought against her, as all her property vested in him during coverture, and there was therefore no means of satisfying a judgment obtained against her alone. Since the passing of the Married Women's Property Act, a married woman is capable of holding separate property, and judgment may be had against her to the extent of her separate property, and to that extent the Act provides that she is liable for, and may be sued alone for, her torts as if she were a *feme sole*. This enactment, however, does not affect the common-law liability of a husband for his wife's torts (*f*); and, consequently, a plaintiff can elect whether he will sue the wife alone, or join her husband as co-defendant with her. Where husband and wife are joined as defendants inconsistent defences cannot be put in (*g*).

Death or divorce.

If the wife dies or the marriage is dissolved (*h*), from that moment the husband's liability ceases, even for torts committed during coverture, and even though an action is pending. Unless judgment has been actually given, his liability is at an end from the moment of her death or the decree absolute.

Separation.

The same rule applies where the parties are judicially separated (*i*). The decree puts an end to the husband's liability from the moment when it is pronounced. But where the parties are living apart under a voluntary separation, a husband's liability for his wife's torts continues (*j*).

(*e*) *Utley* v. *Mitre Publishing Co.* (1901), 17 T. L. R. 720.

(*f*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177.

(*g*) *Beaumont* v. *Kaye*, [1904] 1 K. B. 292.

(*h*) *Capel* v. *Powell*, 17 C. B. (N.S.) 743.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880 [C. A.].

(*j*) *Head* v. *Briscoe*, 5 C. & P. 484; *Utley* v. *Mitre Publishing Co.* (1901), 17 T. L. R. 720.

SECTION II.—LIABILITY OF PARTNERS FOR EACH OTHER'S TORTS. Art. 23.

The foundation of the liability of partners for each other's torts is that each partner is the agent of his copartners in relation to the conduct of the partnership business. The law has now been codified by ss. 10 and 12 of the Partnership Act, 1890.

ART. 24.—*Statutory Rule.*

(1) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefor to the same extent as the partner so acting or omitting to act. Partnership Act, 1890, s. 10.

(2) When the firm is liable, the individual partners are jointly and severally liable. Section 12.

In order to render a firm liable, the tort must be a wrongful act or omission of a partner committed or made either (1) with the authority of his copartners, or (2) in the ordinary course of the firm's business (*k*). If, therefore, it be committed or made without the actual authority of the copartners, and outside the scope of the partner's ostensible authority, the firm will not be liable any more than it would be for a contract entered into under similar circumstances.

(1) Thus a firm of solicitors would be liable for the professional negligence and unskilfulness of one of the partners (*l*). Similarly, a firm of newspaper proprietors would be liable for a libel inserted by an editor partner. So, a firm of company promoters would be liable for a Illustrations. Negligence. Libel.

(*k*) *Hamlyn* v. *Houston*, [1903] 1 K. B. 81.

(*l*) *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337.

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fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside it.

Fraudulent guarantees.

(2) There is one tort from which the firm is specially exempted from liability by the Statute of Frauds Amendment Act, 1828 (*m*), by which it is enacted that the firm is not to be liable for false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing **signed by all the partners.** The signature of the firm's name is insufficient even although all the partners are privy to the misrepresentation (*n*).

SECTION III.—LIABILITY FOR TORTS OF AGENTS AUTHORISED EXPRESSLY OR BY RATIFICATION.

ART. 25.—*Qui facit per alium facit per se.*

A person who expressly authorises another to commit a tort is liable as fully as if he had himself committed the tort. And the agent is also liable. In tort a person cannot excuse himself by saying that he was acting as the agent of another. Agent and principal are equally liable.

NOTE.—A principal is not, however, necessarily answerable for every tort of his agent. If the agent is employed to commit a tort the principal is clearly liable. If the agent is employed to do a thing not in itself wrongful, and in the course of doing the thing for which he is employed he commits a tort, the extent of the principal's liability depends, as we shall see hereafter, partly on whether the agent is a servant or an independent contractor.

(*m*) 9 Geo. 4, c. 14, s. 6.
(*n*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 [Ex. Ch.].

ART. 26.—*Ratification of Tort committed by an Agent.* Art. 26.

A tortious act done for another, by a person not assuming to act for himself, but for such other person (*o*), though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and, whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*p*).

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," and is equally applicable to torts and to contracts.

To constitute a binding ratification of acts done without previous authority (1) the acts must have been done for and in the name of the supposed principal, and (2) full knowledge of them, and unequivocal adoption, must be proved; or else the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent, whatever their nature or culpability (*q*).

The plaintiff's goods were illegally seized under a warrant of distress handed to a bailiff by the defendants. The plaintiff wrote to the defendants seeking reparation. The defendants replied that their solicitors would accept process of service. The defendants had given no special instructions to the brokers. It was held in the Court of Appeal that there was ample evidence of ratification by the defendants, and that they were liable for the wrongful seizure made by the bailiff on their behalf (*r*). Illustration.

(*o*) See *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd.*, [1914], A. C. at p. 213.

(*p*) *Wilson* v. *Tumman*, 6 Man. & Gr. 236, 242.

(*q*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213 [C. A.]; *Wilson* v. *Tumman*, *supra*; and *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Barns* v. *St. Mary Islington* (1912), 76 J. P. 11; *Becker* v. *Richold*, (1913), 30 T. L. R. 142.

(*r*) *Carter* v. *St. Mary Abbot's, Kensington, Vestry*, 64 J. P. 548 [C. A.].

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SECTION IV.—LIABILITY FOR TORTS OF SERVANTS.

ART. 27.—*Respondeat Superior.*

(1) A servant is a person employed by another, and subject to the commands of that other as to the way he shall do his work.

(2) A person who is in the general employment of one man may be the servant of another for a particular purpose, that other having control of him as to the manner in which he carries out his duties in connection with that particular purpose (*s*).

(3) A master is liable for the negligence of his servant committed in the course of his employment (*t*).

(4) A master is liable for the wilful tort of his servant committed within the scope of and in the course of his employment (*u*) and though the tort amounts also to a crime.

It is submitted that despite the apparent conflict of the decisions as to a master's liability for the wilful tort of his servant, the true test is as stated above in paragraph (4). The cases appear to fall into three groups: (1) Where the servant was not about his master's business at the time of committing the tort. (2) Where he was about his master's business but the tortious act could arise only from doing an act the master had not held him out as competent to do. (3) Where he was about his master's

(*s*) *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Donovan* v. *Laing*, [1893] 1 Q. B. D. 629.

(*t*) As to the exceptional case of injury done by one servant to another servant working in a common employment under a common master, see Art. 91, *post*.

(*u*) *Lloyd* v. *Grace Smith & Co.*, [1912] A. C. 716.

business and the act constituting the tort arose from doing an act the master had held the servant out as competent to do. Into group (1) fall cases like *Storey* v. *Ashton*, 86 L. R. 4 Q. B. 476, and *Beard* v. *L. G. O. Co.*, [1900] 2 Q. B. 530. Into group (2) fall cases like *Cheshire* v. *Bailey*, [1905] 1 K. B. 237; *Houghton* v. *Pilkington*, [1912] 3 K. B. 308; and *Mintz* v. *Silverton* (1920), 36 T. L. R. 399. Into group (3)—the group of liability—comes *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259; *Lloyd* v. *Grace Smith & Co.*, [1912] A. C. 716; *Irwin* v. *Waterloo Taxi Cab Co., Ltd.*, [1912] 3 K. B. 588. **Art. 27.**

What constitutes a servant.

The test to be applied to ascertain whether a person doing work for another is or is not his **servant,** is to consider whether the master has complete control of him as to the way he does his work. If he has, the person employed is a servant, and the master is liable for the consequences, because he has made himself responsible not only for the act itself, but for the manner of doing it. Thus, the relation of master and servant is in each case a **question of fact,** depending not on the mode of payment for services, or the time for which the services are engaged, or the nature of those services, or on the power of dismissal (though each of those matters may be taken into consideration), but on the extent of control as to the way in which the work is done (*v*).

Scope of employment.

Whether a servant is acting within the scope of his employment is a question partly of law and partly of fact. Generally, as long as a servant is doing the kind of thing for which he is employed, he is acting within the scope of his employment, though he may have had no express command to do the particular thing complained of. But even whilst doing things of the kind for which he is employed, he gets outside the scope of his employment when he does them not for his master's benefit but for his own private purposes (*w*), as when a coachman, without the

(*v*) Cf. *Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K. B. 820, and *E. London Harbour Board* v. *Caledonia, etc. Co.*, [1908] A. C. 271, and *Baker* v. *Snell*, [1908] 2 Q. B. 825.

(*w*) *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476.

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permission of his master, takes out his master's carriage and drives it for his own purposes.

Illustrations. As to who are servants.

(1) Thus where an owner of a carriage was supplied by a livery-stable keeper with a driver (who was in his employment as a coachman), and the owner of the carriage was also **owner of the horse and harness,** it was held by RUSSELL, C.J., that in all the circumstances of the case the owner of the carriage had control of the driver as to the manner of driving, and the driver was his servant. The owner of the horse and harness would be the person to give directions as to the way in which the horse should be harnessed and driven, and so had control of the driver as to the way in which he should do his work, and accordingly the owner of the carriage was liable for damage done by the negligence of the driver in driving (*x*).

(2) But where two ladies, owners of a carriage, *hired horses* from a livery stable, and with the horses a driver, whom they put into their livery, but to whom they did not pay wages, it was held that the driver was not their servant, and they were not liable for his negligence. The ladies would no doubt give directions as to the places to which they should be driven, but not as to the manner in which the horses should be driven (*y*).

Cabdrivers

(3) It is held that upon the construction of the Metropolitan Hackney Carriages Act. 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them, although, in fact, no such relationship exists, the relationship apart from statute being that of bailor and bailee, and not that of master and servant (*z*). But if the driver is in fact the servant of some person other than the proprietor, that person may also be liable as the driver's master (*a*).

(*x*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565.

(*y*) *Quarman* v. *Burnett*, 6 M. & W. 499.

(*z*) *Venables* v. *Smith*, 2 Q. B. D. 279; and *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281 [C. A.].

(*a*) *Keen* v. *Henry*, [1894] 1 Q. B. 292.

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Servant for particular purpose.

(4) In *Rourke* v. *White Moss Colliery Co.* (*b*) the defendants were sinking a shaft in their colliery and agreed with one Whittle to do the sinking at so much per yard. The defendants agreed to supply an engine and engineer at the mouth of the shaft. The engineer was employed and paid by the defendants, and was their general servant, but was at the time under the orders and control of Whittle, and it was held that he was, for the particular purpose, the servant not of the defendants but of Whittle, and consequently the defendants were not liable for his negligence.

The tort must be committed in the course of the employment.

(5) Where a master entrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that the wrong was not committed in the course of his employment (*c*). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*d*).

Course of employment.

(6) And where a servant does a kind of work for which he is not engaged, he is not acting within the course of his employment so as to make the master liable for his negligence. Thus, when an omnibus conductor drove the omnibus, and whilst so doing negligently ran into the plaintiff, it was held that, in the absence of evidence that the conductor was authorised to drive the omnibus, the defendants were entitled to judgment (*e*).

Wilful torts.

(7) In *Barwick* v. *English Joint Stock Bank* (*f*), the defendants were held liable for the fraudulent statements of their manager made for the benefit of the defendants, and in the course of his business, the statements being made in answer to inquiries by the plaintiff and being to the

(*b*) 2 C. P. D. 205 [C. A.], and see *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629 [C. A.]; *Murray* v. *Currie* (1870), L. R. 6 C. P. 24.

(*c*) *Storey* v. *Ashton*, L. R. 4 Q. B. 476.

(*d*) *Mitchell* v. *Crasswellcr*, 22 L. J. C. P. 100.

(*e*) *Beard* v. *London General Omnibus Co.*, [1900] 2. Q. B. 530 [C. A.].

(*f*) L. R. 2 Ex. 259 [Ex. Ch.].

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effect that a customer of the bank was a person of financial stability. These statements were untrue to the knowledge of the manager, and were made with intent to deceive—but not for the benefit of the manager but to benefit the bank. But the decision in *Lloyd* v. *Grace Smith & Co.* (*g*) has rendered the intention of the servant to benefit his employer no longer a basis of the latter's liability.

Wrongful arrest by servants.

(8) In *Poulton* v. *London and South Western Rail. Co.* (*gg*), a station-master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff and detained him in custody until it was ascertained by telegraph that all was right. **The railway company had no power whatever to arrest a person for non-payment for carriage of a horse,** and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station-master; and MELLOR, J., said: "If the station-master had made **a mistake in committing an act which he was authorised to do,** I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in **a manner in which the company themselves would not be authorised to act,** and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns."

(9) In an earlier case in which a station-master and a policeman employed by a railway company wrongfully arrested a man for not paying his fare, the company was held liable, as **the company had power to arrest a passenger for travelling without paying his fare,** and must be taken to have authorised the officials to take into custody persons whom they believed to be committing that offence. The officials made a mistake in the particular case, but it was "**a mistake made within the scope of their authority**" (*h*).

(*g*) [1912] A. C. 716, followed in *Ormiston* v. *G. W. Rail. Co.*, [1917] 1 K. B. 598.

(*gg*) L. R. 2 Q. B. 534.

(*h*) *Goff* v. *Great Northern Rail. Co.*, 3 E. & E. 672.

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It is submitted that the two decisions last quoted, together with that in *Ormiston* v. *G. W. Ry. Co.* (1917), establish no more than this, that where an act is done by the servant of a company, and such act is *ultra vires* the company, authority to do such act cannot be *implied*. Nothing in these decisions tends to relieve a company from the consequences of the tortious acts of its servants if *expressly* authorised by the proper authority in the company.

Assaults by servant.

(10) So, again, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (*i*) the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' byelaws did not expressly authorise the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but nevertheless the court considered that the act of the porter in pulling the plaintiff out of the carriage was an act done in the course of his employment as the defendants' servant.

In that case WILLES, J., says: "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise when an act of that class is to be done and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

Criminal acts.

(11) The defendants employed a manager to manage a branch of their business, which was the sale of furniture on the hire-purchase system. The manager sold a piece

(*i*) L. R. 7 C. P. 415.

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of furniture to a person living in the plaintiff's house, and on one of the instalments being in arrear he went to the plaintiff's house and removed the furniture. Whilst so doing he assaulted the plaintiff. The jury found that the manager committed the assault in the course of his employment, and it was held that the defendants were liable. The manager was employed to get back the furniture and committed the assault for the purpose of furthering that object and not for private purposes of his own, and the defendants were held liable for the wrongful act of their servant although the assault was a criminal offence (*j*).

(12) So, too, a corporation is liable for the libels or slanders published by its servants and uttered within the scope of their employment (*k*), but not for those outside the scope of their employment (*l*).

ART. 28.—*Unauthorised Delegation by Servant.*

A master is not liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties. A servant may have express authority, and in some cases may have implied authority, to delegate his duties to another, but if without such authority he delegates his duties to another, that other does not become the agent of the master. *Quære*, might not the master be liable if the act of the servant in so delegating amounts to negligence ? (*m*).

Illustrations.

(1) Thus, where the driver and conductor of an omnibus authorised a bystander to drive the omnibus (the driver having been ordered to discontinue driving by a policeman

(*j*) *Dyer* v. *Munday*, [1895] 1 Q. B. 742 [C. A.].
(*k*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423 [P.C.].
(*l*) *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209.
(*m*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.]; *R.* v. *Earl of Crewe*, [1910] 2 K. B. 576; *Roper* v. *Public Works Commissioners*, [1915] 1 K. B. 45.

who thought he was drunk), and the bystander, whilst driving, negligently injured the plaintiff, it was held that the defendants were not liable as the bystander was not their agent (*n*). Art. 28

(2) But where the driver of a cart negligently left the cart in custody of a lad whose duty it was to go with the cart to deliver parcels, but had been forbidden to drive, and the lad drove the cart so that it collided with the plaintiff's carriage, the employer of the driver was held liable **for the negligence of the driver in leaving the cart in custody of the lad.** But the employer would not have been liable for the negligence of the lad, as he was not acting within the scope of his employment, and the driver had no authority to delegate the driving to him (*o*).

ART. 29.—*Servants of the Crown.*

The heads of Government departments and superior officers are not liable for the torts of their subordinates committed in carrying out the business of the Crown unless they have themselves ordered or directed the commission of the tort (*p*).

Explanation.

The head of a Government department is not the master of the Government servants belonging to the department; nor are soldiers or naval seamen the servants of the officers who command them. All are servants of the Crown, serving under a common master. Though the soldier is absolutely subject to the orders of his officer he is no more his servant in law than is a stable boy the servant of the coachman, or a railway porter the servant of the station-master or the general manager of a railway company (*q*).

(*n*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 [C. A.].
(*o*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.].
(*p*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178 [C. A.].
(*q*) *Stone* v. *Cartwright*, 6 Term Rep. 411.

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SECTION V.—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTORS.

ART. 30.—*The General Rule.*

(1) A principal is not liable for the collateral negligence of an independent contractor, that is, for a negligent act or omission which arises incidentally in the course of the performance of the work.

(2) But to this rule there are five exceptions :

(a) Where an independent contractor is employed to do an act unlawful in itself the principal is liable for the direct consequences of such act, and is also liable for the consequences of the agent's negligence in the course of doing the act (*r*).

(b) If the principal is under an obligation by contract or statute to do a particular thing, and he employs an independent contractor to do it, he is liable if the contractor neglects to do the thing, or does it improperly. He cannot get rid of his duty by employing an agent (*s*).

(*c*) Where the thing which the independent contractor is employed to do will be a nuisance, or is likely in the ordinary course of events to cause damage, unless proper precautions are taken, the principal is liable for the neglect of

(*r*) *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767, p. 65, *post*.
(*s*) *Hole* v. *Sittingbourne and Sheerness Rail. Co.*, 6 H. & N. 488 ; *Padbury* v. *Holliday & Greenwood* (1912), 28 T. L. R. 494 ; *Hurlstone* v. *London Electric Railways* (1914), 30 T. L. R. 398.

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the contractor to take those precautions (*t*).

(d) Where the employer actually interferes in the contractor's work (*u*).

(e) In cases within s. 4. of the Workmen's Compensation Act, 1906, which gives servants of contractor a right to compensation from contractor's employer.

Comment on above rule.

It will be noticed that the liability of one who employs another to do work is not so extensive where the person employed is an independent contractor as it is where that other is a servant. A master has control of the servant as to the way he does his work, and it is his duty to see that the work is so done as not to cause damage to others—so he is liable for the collateral negligence of the servant. When an independent contractor is employed, the principal is only liable for acts which he has expressly or impliedly authorised. But a person who is under a duty to do something cannot evade that duty by deputing its performance to another. So if a person is under an obligation to do something and he employs an agent to do it, he is responsible for any neglect of the agent to perform that duty properly.

So, too, if a person chooses to do something which he does at his peril, or something which will be dangerous if not properly done, he must see that the person he employs to do the work does it properly. Having authorised the work, he cannot escape responsibility for its being carried out in such a manner as not to be dangerous.

Pickard v. *Smith.*

In the leading case (*v*) a railway company had let the refreshment rooms and a coal cellar to the defendant, Smith. The opening for shooting the coals into the cellar was on the arrival platform. Whilst the servants of a coal merchant (an independent contractor) were shooting coals into the cellar for Smith, the plaintiff, a passenger on

(*t*) *Hughes* v. *Percival*, 8 App. Cas. 443.
(*u*) *Burgess* v. *Gray* (1845), 1 C. B. 578.
(*v*) *Pickard* v. *Smith*, 10 C. B. (N.S.) 470; *Holliday* v. *Nat. Tel. Co.*, [1899] 2 Q. B. 392.

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the railway, in passing out of the station, without any fault on his part, fell into the cellar opening, which was insufficiently guarded owing to the negligence of the servants of the coal merchant. The court held that Smith was liable, although the coal merchant was an independent contractor and his servants were not Smith's servants. WILLIAMS, J., in delivering the judgment of the court, said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; and by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open and to close it when the coals were all put in. The act of opening it was the act of the employer though done through the agency of the coal merchant; and the defendant having thereby caused danger was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it furnishes no excuse, either in good sense or law" (*w*).

Illustrations. Independent contractors.

(1) A railway company was empowered by Act of Parliament to construct a railway bridge over a highway. The company employed a contractor to do the work. A servant of the contractor negligently caused the death of a person passing underneath on the highway by allowing a stone to fall on him. The contractor would no doubt have been liable for the negligence of his servant, but in an action brought by the administratrix of the deceased against the

(*w*) And see *Holliday* v. *Nat. Tel. Co.*, [1899] 2 Q. B. 392.

railway company the defendants were held not liable for the negligence of the workman, being that of an agent who was not their servant, and merely collateral to the work which he was employed to do (*x*). It would seem that liability for the acts of the independent contractor and his servants exists where the damage is caused by an act done in the performance of a dangerous undertaking under circumstances where there is a legal obligation to carry out the undertaking properly, *e.g.*, when the undertaking is to be conducted on or about a highway. Art. 30.

Illustrations of exceptions.

(2) A company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an unlawful act (*y*).

(3) So where the defendants were authorised, by an Act of Parliament, to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable under exception (b), and could not excuse themselves by throwing the blame on their contractors (*z*).

(4) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by

(*x*) *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same*, 4 Ex. 244. This decision can hardly be reconciled with that in *Holliday* v. *Nat. Tel. Co.*, [1899] 2 Q. B. 392.

(*y*) *Ellis* v. *Sheffield Gas Consumers Co.*, 23 L. J. Q. B. 42.

(*z*) *See Hole* v. *Sittingbourne and Sheerness Rail Co.*, 6 H. & N. 488; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; *The Snark*, [1899] P. 74.

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the contractor to support it being insufficient :—*Held*, on the principle above laid down (exception (c)), that the defendant was liable (*a*).

(5) A district council employed a contractor to make up a highway, which was used by the public but was not repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil unlighted and unprotected. The plaintiff, walking along the road after dark, fell over the heap and was injured. In an action against the district council and the contractor to recover damages, it was held that, as from the nature of the work danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not collateral to his employment, and the district council (as well as the contractor) were liable (*b*).

(6) Where the defendant maintained a lamp hanging over a highway for his own purposes, it was his duty to maintain it so as not to be dangerous to the public, and when he employed a contractor to repair it, but the contractor did his work badly, the defendant was liable for injury caused thereby to a person passing on the highway (*c*).

(7) Where a contractor was employed to clear and burn the bush on land belonging to the defendants, and he negligently lit a fire on the land and permitted it to spread on to the plaintiff's land, the defendants were held liable, even though the contractor in lighting the fire had disregarded the express stipulations as to the time at which the fire should be lit, on the ground that, having authorised the lighting of the fires, they were bound not only to stipulate that precautions should be taken, but to see that they were taken (*d*).

(*a*) *Bower* v. *Peate*, 1 Q. B. D. 321, approved in *Dalton* v. *Angus*, 6 App. Cas. 740, and *Hughes* v. *Percival*, 8 App. Cas. 443. *Aliter* if the work is not dangerous ; *Wilson* v. *Hodgson* (1915), 85 L. J K. B. 270.

(*b*) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72 [C. A.]; and see *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392 [C. A.].

(*c*) *Tarry* v. *Ashton*, 1 Q. B. D. 314.

(*d*) *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48 [P. C.].

CANADIAN NOTES TO CHAPTER VI. OF PART I.

Article 23.

The provincial statutes relating to married women have not relieved husbands of responsibility for their wives' torts. For recent cases in which the husband has been held liable see: *McArthur* v. *Tyas* (1920), 2 W. W. R. 425 (Alta.), and *Mackenzie* v. *Cunningham* (1901), 8 B. C. R. 206.

In Quebec the husband is not liable unless he has participated in or authorised the delict of his wife: *Camiré* v. *Bergeron* (1889), 3 Que. Pr. R. 281.

Article 24.

Under Article 1865 of the Quebec Code commercial partners are jointly and severally liable for all the obligations of the partnership, including those arising out of delict. In the case of non-commercial partnerships they are liable to the creditor in equal shares, irrespective of their shares in the partnership (Art. 1854).

Partnerships in the common law provinces are governed by the rule laid down in the text.

Articles 25 and 26.

For a case illustrating the ratification of a tortious act see *Thien* v. *Bank of British North America* (1912), 21 W. L. R. 192; 4 D. L. R. 388.

Article 27.

The most difficult problem arising under this Article is that of determining the extent of a master's responsibility for the acts of a disobedient servant. Upon this question the student is strongly recommended to read the elaborate judgments delivered in the Supreme Court in the case of *Curley* v. *Latreille* (1920), 60 S. C. R. 131; 55 D. L. R. 461. The case, which was one of a joy-riding chauffeur, arose under Article 1054 of the Quebec Code (see below), and the opinion of the majority indicates that the Code arrives at the same result as the common law.

Whether the tortfeasor is a servant or an independent contractor is a question of fact in each case. See *Cockshutt Plow Co.* v. *Macdonald* (1912), 5 Alta. L. R. 184; 22 W. L. R. 798; 2 W. W. R. 488; 8 D. L. R. 112: *Lortie* v. *Wright* (1917), 26 Que. K. B. 18.

In determining whether or not A. is the servant of B., the essential test is the nature of the control which B. exercises over A. In *Consolidated Plate Glass Co.* v. *Caston* (1899), 29 S. C. R. 624, the defendant company hired the servant, horse, and wagon of another company for the purpose of delivering their goods, and the servant drove the wagon to such places as the defendants might indicate. It was held that he was not the servant of the defendants, so as to make them liable for an accident due to his negligent driving.

In Article 1054 of the Quebec Code the rules of vicarious liability are laid down in the following terms:—

"He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;

"The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

"Tutors are responsible in like manner for their pupils:

"Curators or others having the legal custody of insane persons, for the damage done by the latter;

"Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

"The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

"Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

In *Internoscia* v. *Bonelli* (1905), 28 Que. S. C. 59, the defendant's daughter broke off her engagement with the plaintiff. Breach of promise of marriage raises a delictual liability under the Quebec law, and the father was ordered to pay damages. See also *Bergeron* v. *Dagenais* (1913), 47 Que. S. C. 492.

In *Corby* v. *Foster* (1913), 29 O. L. R. 83; 13 D. L. R. 664, an attempt was made under the common law to hold a father responsible for his son's tort on the ground that he knew the boy to be of a vicious disposition, the theory apparently being that a boy was a species of dangerous animal. Judgment was given for the defendant. So again in *Walker* v. *Martin* (1919), 46 O. L. R. 144; 49 D. L. R. 593, it was held that a father is not liable for the negligence of a daughter who drives his car without his consent.

Article 28.

There appears to be no Canadian authority upon the question raised by this Article. In most cases the unauthorized delegation by the servant would itself amount to negligence.

For example, in *Hill* v. *Winnipeg Electric Ry.* (1911), 21 Man. L. R. 442; 46 S. C. R. 654; 8 D. L. R. 106, the motorman and the conductor of a street car exchanged places. It was held that the negligence of the motorman in so doing was the effective cause of the accident, and that the company was therefore responsible.

Article 29.

See the notes on Article 21. In cases of negligence a remedy against the Crown itself is now provided in Canada by the Exchequer Court Act.

Article 30.

In *Cockshutt Plow Co.* v. *Macdonald* (1912), 5 Alta. L. R. 184; 22 W. L. R. 798; 2 W. W. R. 488; 8 D. L. R. 112, the parties were owners of adjoining lands. The company employed a reliable firm of contractors to erect a building upon their land. Owing to the negligence of the contractors' workmen the building collapsed upon Macdonald's land, causing damage. It was held that the company were not liable in an action based upon negligence.

In *McIntosh* v. *Simcoe County* (1914), 15 Ont. L. R. 73, the defendants were held liable for the frightening of horses on a highway by a cement mixer that was under the control of an independent contractor, since in authorising the use of such a machine on the highway they had created a public danger. Reference may also be made to *Scott* v. *City of Quebec* (1913), 44 Que. S. C. 184.

CHAPTER VII.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

SECTION I.—COMMON LAW.

ART. 31.—*Death generally destroys the Right of Action.*

(1) As a general rule, the right to sue and the liability to be sued for torts ceases with the life of either party.

(2) This rule does not apply where the tort was committed **by the deceased** and consists of :

(a) The appropriation by the deceased of property (or the proceeds or value of property) belonging to the plaintiff (*a*) ; or

(b) An injury to real or personal property committed by the deceased within six calendar months of his death (*b*).

The rule does not apply when the death is that of **the person who would have been plaintiff** if he had lived, and the tort consists of :

(a) An injury to *real* property of the deceased, committed within six calendar months of his death (*c*) ; or

(*a*) *Phillips* v. *Homfray*, 24 Ch. D. 439 [C. A.] (1883).

(*b*) 3 & 4 Will. 4, c. 42, s. 2 ; see *Kirk* v. *Todd*, 21 Ch. D. 484 [C. A.]. The action must be brought within six months of constitution of a personal representative.

(*c*) *Ibid.* The action must be brought within twelve months of death.

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(b) An injury to the personal property of the deceased (*d*).

NOTE.—Where the death is that of the person injured the rule "*actio personalis moritur cum personâ*" only applies to torts of a purely personal nature, such as libel and assault; it does not apply to any torts whereby the personal property of the deceased has suffered (*e*).

Illustrations.

(1) An action to restrain the infringement of a registered trade mark may be brought by the executors of the owner of the trade mark in the event of his dying before action brought, or, if brought, may be continued by his executors after his death (*f*).

(2) The case of *Hatchard* v. *Mège* (*g*) is an excellent example of the rule under consideration. There it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action **only so far as it was a claim for libel**; but so far as the alleged tort was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

ART. 32.—*Effect of Bankruptcy.*

(1) The right of action in tort belonging to one who becomes bankrupt, is not affected by his bankruptcy (*h*) unless the tort is one which causes actual loss to his estate, in which case the right passes to his trustee (*i*).

(*d*) 4 Edw. 3, c. 7; 25 Edw. 3, c. 5.
(*e*) *Twycross* v. *Grant*, 4 C. P. D. 40.
(*f*) *Oakey & Son* v. *Dalton*, 35 Ch. D. 700.
(*g*) 18 Q. B. D. 771.
(*h*) *Rose* v. *Buckett*, [1901] 2 K. B. 449.
(*i*) Bankruptcy Act, 1914; *Wilson* v. *United Counties Bank, Ltd.*, [1920] A. C. 120.

(2) A right of action for tort against one who becomes bankrupt, is not destroyed by the bankruptcy, nor can the plaintiff prove in the bankruptcy for compensation (*j*). Art. 32.

(1) Thus a bankrupt may, even during the continuance of the bankruptcy, sue another for libel or assault, or for seduction of his servant (*k*) ; and may, it is conceived, keep any damages which he may recover for his own use and benefit (*l*). Illustrations.

(2) So in an action for trespass and seizure of goods in which the plaintiff alleged damage to the goods, damage to the premises, and personal annoyance to himself and his family, and it was admitted that no substantial damage was done to the premises or the goods, it was held that the right of action did not pass to the trustee in bankruptcy (*m*).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustees, and the bankrupt loses the right of suing for the abstract tort to his right (*n*), unless there were two distinct causes of action (*n*).

SECTION II.—STATUTORY LIABILITY FOR CAUSING DEATH.

ART. 33.—*Actions by Personal Representatives of Persons killed by Tort.*

(1) Whenever the death of a person is caused by a wrongful act, neglect or default of another which would (if death had not ensued) have entitled the party injured to maintain an action Lord Campbell's Act.

(*j*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (2), and s. 37 ; *Watson* v. *Holliday*, 20 Ch. D. 780; 52 L. J. Ch. 543 ; *Ex parte Stone, Re Giles*, 37 W. R. 767.

(*k*) *Beckham* v. *Drake*, 2 H. L. Cas. 579.

(*l*) *Ex parte Vine*, 8 Ch. D. 364 [C. A.].

(*m*) *Rose* v. *Buckett*, [1901] 2 K. B. 449.

(*n*) *Brewer* v. *Dew*, 11 M. & W. 625; and *Hodgson* v. *Sidney*, L. R. 1 Ex. 313 ; Bankruptcy Act, 1914, s. 18 (1).

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in respect thereof, then the wrongdoer is liable to an action, even although the circumstances amount in law to a felony (*o*).

(2) Every such action must be for the benefit of the wife, husband, parent and child of the deceased, and must be brought by and in the name of the executor or administrator of the deceased person (*p*).

(3) Where there is no personal representative, or no action is brought by him within six months, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative could have sued (*q*).

(4) In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought. The amount so recovered, after deducting the costs not recovered from the defendant, is divided amongst the before-mentioned parties (or such of them as may be in existence) in such shares as the jury by their verdict may direct (*r*).

(5) Not more than one action lies for the same cause of complaint, and every such action must be commenced within one year after the death of the deceased (*s*).

Explanation.

At common law no action lay against any person who by his wrongful act, neglect, or default caused the immediate death of another person, even though damage was thereby

(*o*) Fatal Accidents Act, 1846 (usually called Lord Campbell's Act) (9 & 10 Vict. c. 93), s. 1.

(*p*) *Ibid.*, s. 2.

(*q*) 27 & 28 Vict. c. 95, s. 1, and see *Holleran* v. *Bagnell*, 4 L. R. Ir. 740.

(*r*) 9 & 10 Vict. c. 93, s. 2.

(*s*) 9 & 10 Vict. c. 93, s. 4.

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directly caused to others by being deprived of his services or support. Still less could his personal representatives bring an action in respect of the wrong committed to the deceased himself. And this is still the law, except in so far as an action lies under Lord Campbell's Act. So a master cannot bring an action for injuries which cause the immediate death of his servant, though he suffers loss by being deprived of those services, nor can a father recover in respect of the funeral expenses incurred by reason of the death of his daughter caused by the negligence of the defendant (*t*).

Points to be noted.

The following points must be remembered—

(1) No action lies unless, had the deceased lived, he himself could have maintained an action at the time of his death. So it is a good defence that the deceased would have had no cause of action as his injuries were caused by his contributory negligence (*u*). So, too, if the deceased's cause of action would at the time of his death have been barred by a Statute of Limitations (*x*), or by his having accepted satisfaction for his injuries (*y*), or agreed not to sue (*z*), no action can be brought under the Act.

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased. **Parent** includes a grand-parent and a step-parent. **Child** includes a grand-child and a step-child, and a child *en ventre sa mère* (*a*), but not an illegitimate child (*b*). The jury apportion the damage amongst these persons in such shares as they may think proper.

(*t*) *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.]. But the rule does not apply where the cause of action is *breach of contract* and the death was part of the damages (*Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193). It has been held that where by the negligence of the defendant a servant is *injured* but not killed, the master may bring an action for loss of services, *sed quare* (*Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163).

(*u*) *Pym* v. *Great Northern Rail. Co.*, 4. B. & S. 396 [Ex. Ch.].

(*x*) *Williams* v. *Mersey Dock Board*, [1905] 1 K. B. 804 [C. A.].

(*y*) *Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555.

(*z*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357.

(*a*) *The George and Richard*, L. R. 3 A. P. & E. 466; 24 L. T. 717.

(*b*) *Dickinson* v. *North Eastern Rail. Co.*, 2 H. & C. 735.

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What damage must be proved.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*c*). "*Pecuniary* loss" means "some substantial detriment from a worldly point of view." Thus, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*d*): as where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*e*). Even loss of mere gratuitous liberality is sufficient (*f*). But where a father employed his son, who was a skilled workman, at the current rate of wages, and the son did not contribute to the father's support, it was held that the father had no claim, as he had suffered no pecuniary loss by the death of his son (*g*).

(4) But "where a man has no means of his own and earns nothing, his wife or children cannot be pecuniary losers by his decease. In the like manner when by his death the whole estate from which he derived his income passes to his widow or to his child (as was the case in *Pym* v. *Great Northern Rail. Co.* (*h*)), no statutory claim will lie at their instance" (*i*). So, too, the jury cannot, in such cases, take into consideration the grief, mourning, and funeral expenses to which the survivors were put. And this seems reasonable; for, in the ordinary course of nature, the deceased would have died sooner or later, and the grief, mourning, and funeral expenses would have had to be borne then, if not at the time they were borne (*k*).

(*c*) *Franklin* v. *South Eastern Rail. Co.*, 3 H. & N. 211.

(*d*) *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396 [Ex. Ch.]; *Franklin* v. *South Eastern Rail. Co, supra*; *Ryan* v. *Oceanic Steam Navigation Co.* (1914), 110 L. T. 641.

(*e*) *Hetherington* v. *North Eastern Rail. Co.*, 9 Q. B. D. 160.

(*f*) *Dalton* v. *South Eastern Rail. Co.*, 27 L. J. C. P. 227.

(*g*) *Sykes* v. *North Eastern Rail. Co.*, 44 L. J. C. P. 191; and damages have been awarded for the loss of domestic services of a wife (*Berry* v. *Humm*, [1915] 1 K. B. 627), and for loss of anticipated earnings of a daughter (*Taff Vale Rail. Co.* v. *Jenkins*, [1913] A. C. 1).

(*h*) 2 B. & S. 759 [Ex. Ch.].

(*i*) *Per* Lord WATSON in *Grand Trunk Rail. Co. of Canada* v. *Jennings*, 13 App. Cas. 800, 804.

(*k*) *Blake* v. *Midland Rail. Co.*, 18 Q. B. 93; *Dalton* v. *South Eastern Rail. Co.*, 4 C. B. (N.S.) 296; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.].

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(5) If the deceased obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*l*).

Insurance not to be taken into account.

(6) It was formerly held that where the deceased had insured his life the jury in assessing damages ought to take into account the value of the policy payable on his death in diminution of damages. This is now, however, altered by the **Fatal Accidents Act, 1908** (*m*), by which the rule under Lord Campbell's Act is made the same as in common-law actions for damages (*n*), and "*any sum paid or payable on the death of the deceased under any contract of assurance or insurance*" *is not to be taken into account.*

(*l*) *Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555. But see *Daly* v. *Dublin, Wicklow and Wexford Rail. Co.*, 30 L. R. Ir. 514 [C. A.], where the Irish courts decided *contra*.

(*m*) 8 Edw. 7, c. 7.

(*n*) See Art. 40, *post*.

CANADIAN NOTES TO CHAPTER VII. OF PART I.

Article 31.

All the Canadian provinces except Quebec have statutes to the same effect as the rules laid down in the text. In cases of personal injuries causing death no right of action accrues to the administrator, except to the extent and for the purposes defined in Lord Campbell's Act. See *England* v. *Lamb* (1918), 42 Ont. L. R. 60, explaining R. S. Ont. (1914), c. 121.

The only Quebec authority appears to be the case of *Thompson* v. *Strange* (1879), 5 Q. L. R. 205, where the plaintiff in an action for false imprisonment died after action brought, and the proceedings were continued by his widow as tutrix to the children. Casault, J., held that in cases where the delict affects the person, and not the property, the right to bring action perishes with the injured party; but after action brought: "Du moment où la demande est formée, les dommages sont une créance acquise: il ne reste plus qu'à en établir le montant en les liquidant. Les héritiers succèdent à cette créance comme aux autres qu'ils trouvent dans la succession, et les frais de l'action, si elle est renvoyée, sont aussi une dette de la succession."

Article 32.

By section 20(i-c) of the Dominion Bankruptcy Act of 1920, the trustee is entitled to maintain and defend all actions "relating to the property of the debtor."

By section 44 (i) "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy or in proceedings under an authorised assignment."

Article 33.

Statutes similar in effect to Lord Campbell's Act have been enacted by all the provinces. In Quebec the principle is adopted by Article 1056 of the Civil Code.

The right of action under these statutes belongs to the personal representative of the deceased, and not to the relatives. In *McKerral* v. *City of Edmonton* (1912), 7 D. L. R. 661, the plaintiff sued in the character of parent. The court held that he had no right of action as parent, and refused an application to amend the statement of claim, since the effect of this would have been to extend the statutory period within which the action had to be brought.

Damages cannot be awarded for the benefit of parents unless they can shew that they had some reasonable expectation of pecuniary benefit from the deceased child: see *Brown* v. *B. C. Electric Ry. Co.* (1909), 15 B. C. R. 350. No sum can be awarded by way of *solatium doloris*: *Quebec Railway Light and Power Co.* v. *Poitras* (1904), 15 Que. K. B. 429; *Central Vermont Ry.* v. *Franchère* (1904), 35 S. C. R. 68.

The right of action arising under Article 1056 of the Quebec Code is an independent right, and is not derived from the deceased. The defendant cannot plead that the deceased has received "satisfaction" by his membership of a railway insurance society by virtue of which his representatives would have received insurance money even in the event of natural death: *Miller* v. *Grand Trunk Ry. Co.* (1906), A. C. 187; 15 Que. K. B. 118.

For cases arising in the other provinces see *Grand Trunk Ry. Co.* v. *Jennings* (1888), 13 App. Cas. 800.

The student should be careful to distinguish the liability created by these statutes from that arising under the more modern Workmen's Compensation Acts. In the latter case the liability of the master is not really delictual at all, but is an incident which the law now attaches to the contract of employment.

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.

ART. 34.—*Damages for Personal Injury.*

THERE is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, and the finding of the jury will only be disturbed—

(a) Where the amount of the damages awarded is so excessive that no twelve men could reasonably have given it (*a*) ;

(b) Where the court comes to the conclusion from the amount or other circumstances that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages (*b*) ;

(c) Where the smallness of the award shows that they have either failed to take into consideration some essential element (*c*), or have compromised the question (*d*).

Comment.

The court will not interfere with the verdict of a jury merely on the ground that the damages awarded (*e*) are more than the court itself would have awarded. The court must be satisfied that the jury has not really acted

(*a*) *Praed* v. *Graham*, 24 Q. B. D. 53.

(*b*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*c*) *Phillips* v. *London and South Western Rail. Co.*, 4 Q. B. D. 406.

(*d*) *Falvey* v. *Stanford*, L. R. 10 Q. B. 54 ; *Karavias* v. *Callinicos*, [1917] W. N. 323.

(*e*) *Britton* v. *South Wales Rail. Co.*, 27 L. J. Ex. 355.

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reasonably on the evidence, but has been misled by prejudice or passion, or has acted on a wrong principle (*f*). The only power of the court, if they think the damages excessive, is to send the case down for a new trial. They cannot (except by consent) usurp the functions of a jury, and themselves assess the damages (*g*).

So, in an action for false imprisonment, libel, or malicious prosecution, the jury may take into account the injured feelings and reputation of the plaintiff, and not merely his pecuniary loss.

Assault.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*h*).

And where damage which is not actionable is combined with damage which results from an actionable wrong, the former damage may be taken into consideration to swell the damages awarded on the actionable wrong (*i*).

ART. 35.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act (*j*).

(2) In actions for trespass to real property the measure of damages is the loss the plaintiff has sustained in consequence of the wrongful acts of the defendant, and not the benefit which accrues to the latter.

(*f*) *Per* Lord HALSBURY, L.C., in *Watt* v. *Watt*, [1905] A. C. 115; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*g*) *Watt* v. *Watt*, [1905] A. C. 115.

(*h*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*i*) *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193; *Griffith* v. *Richard Clay & Sons*, [1912] 2 Ch. 291.

(*j*) See *Rust* v. *Victoria Dock Co.*, 36 Ch. D. 113 [C. A.].

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(3) When the wrong consists in depriving the plaintiff of his personal property the measure of damages is the market value of the property at the time of the commission of the wrong.

(4) Where the wrong results in the plaintiff's being temporarily deprived of the use of personal property the measure of damages is the value of the use of which he is deprived.

Conversion.

(1) Thus, for the conversion of chattels, the full market value of the chattel at the date of the conversion is, in the absence of special damage, the true measure. Where the conversion consists in a refusal to deliver them up to the person entitled to them, the value at the time of the refusal is the measure of damages (*k*).

If there is no market value, the actual value must be ascertained otherwise (*l*).

Trespass to land.

(2) Where the defendant cut a ditch across the plaintiff's land, the measure of damages was the diminution in value of the land, and not the cost of restoring it (*m*).

(3) In *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* (*n*), another principle was applied in peculiar circumstances. The defendants had wrongfully tipped on the plaintiff's land spoil from a colliery, and it was held that in the special circumstances the value of the land to *the defendants* for tipping purposes was the proper measure, as the defendants had had the use of the plaintiff's land for years, and they ought not to do this without paying for it.

Taking coal.

(4) So, where coal has been taken, by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances)

(*k*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521 [C. A.].

(*l*) *France* v. *Gaudet*, L. R. 6 Q. B. 199.

(*m*) *Jones* v. *Gooday*, 8 M. & W. 146.

(*n*) [1896] 2 Ch. 538; and see *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A. C. 323.

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for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*o*).

Loss of use of a chattel.

(5) Where, owing to a collision, the plaintiffs lost the use of a dredger for some weeks, they were entitled to recover as damages for the loss of the use of the dredger a sum equivalent to the cost of hiring such a dredger, although they were not out of pocket in any definite sum (*p*). And where a harbour board lost the use of a lightship by reason of its being damaged by collision, they recovered not only the cost of the repairs, but a sum for the loss of the use of the lightship, although its place was taken by a spare lightship they kept in reserve (*q*). But where the defendant detained a ship belonging to the plaintiff which was in use on a non-paying route purely for maintenance of business connection and future profit, loss of such future profit by such detention was held too remote (*r*). It is the duty of the plaintiffs to use all reasonable means to mitigate his loss and the measure of damage is the loss actually incurred (*s*).

ART. 36.—*Presumption of Damage against a Wrong-doer.*

If a person who has wrongfully converted property refuses to produce it, it will be presumed as against him to be of the best description (*t*).

Illustrations.

(1) Thus, in the leading case (*t*), where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce

(*o*) *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46 [C. A.].

(*p*) *The Greta Holme*, [1897] C. A. 596; *The Marpessa*, [1907] A. C. 241.

(*q*) *The Mediana*, [1900] A. C. 113.

(*r*) *The Bodlewell*, [1907] P. 286.

(*s*) *British Westinghouse Co.* v. *Underground Electric Rails.*, [1912] A. C. 673; cf. this with the judgment of Lord Wrenbury in *Jamal* v. *Moolla Dawood & Co.*, [1916] 1 A. C., at page 179; applied in *Keck* v. *Faber* (1916), 60 Sol. Jo. 253.

(*t*) *Armory* v. *Delamirie*, 1 Str. 504; 1 Sm. L. C. 356.

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it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket ; for *Omnia præsumuntur contra spoliatorem.*

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*u*).

ART. 37.—*Consequential Damages.*

Where special damage has resulted naturally and directly from the tortious act it may be recovered : such damage must be either the intended result of the defendant's act or the natural and probable result of such act.

The difficulty in cases under this rule is to determine what damages are the intended or natural and probable result of the tortious act and what are too remote.

Illustrations.

Loss of earnings.

(1) If, through a person's wilful or negligent conduct, corporal injury is inflicted on another, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered, for it is the natural result of the *injuria* (*v*).

Mental shock.

(2) Where the tort occasions as a natural result mental shock, damages may be recovered in respect thereof. It was long doubted whether mental shock caused by fright without any bodily injury was a subject for damages, but it has now been decided that damages are recoverable in respect thereof (*w*). But such shock must be evidenced by outward signs.

(*u*) *Mortimer* v. *Cradock*, 12 L. J. C. P. 166.

(*v*) *Phillips* v. *London and South Western Rail. Co.*, 4 Q. B. D. 406 ; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*w*) *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669—an action for negligence. Disapproving the decision in *Victorian Rail. Commissioners* v. *Coultas* (13 App. Cas. 222) and *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57—an action for damages for shock caused by the defendant, as a practical joke, falsely telling the plaintiff that her husband had had his legs broken in an accident ; *Janvier* v. *Sweeney*, [1919] 2 K. B. 316.

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Medical expenses.

(3) So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*x*).

Infection.

(4) A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not; and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*y*). But where the facts support an action of trespass in such action *scienter* need not be proved (*z*).

Loss of ship.

(5) So, where a steamer (wholly to blame) collided with a sailing vessel, and destroyed its instruments of navigation, and in consequence of that loss the sailing ship ran ashore, and was lost while making for port, it was held that the loss of the ship was the natural result of the collision, and that the owners of the steamer were liable (*a*).

Novus actus interveniens.

(6) But where defendant had an ordinary water supply and tap in his house, and the tap was turned on and the waste pipes plugged by the malicious act of a third person over whom defendant had no control, as no negligence was shown defendant was held not liable for damage done to premises below from escape of the water (*b*).

(7) Again, where a steam lorry was left on a highway unattended and a third person succeeded in setting it in motion by operating a complex mechanism, as it was not reasonable that defendant should have anticipated the successful interference of a third party he was held not guilty of negligence, and not liable for the damages resulting from the act of the third party (*c*).

(*x*) *Dixon* v. *Bell*, 1 Stark. 287; and see *Spark* v. *Heslop*, 28 L. J. Q. B. 197.

(*y*) *Mullett* v. *Mason*, L. R. 1 C. P. 559.

(*z*) *Theyer* v. *Purnell*, [1918] 2 K. B. 333.

(*a*) *The City of Lincoln*, 15 P. D. 15 [C. A.]; *Weld-Blundell* v. *Stephens*, [1920] A. C. 956.

(*b*) *Rickards* v. *Lothian*, [1913] A. C. 263.

(*c*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148.

The above two illustrations (6) and (7) serve to show that defendant must be liable for the tort complained of before the question of remoteness arises. **Art. 37.**

ART. 38.—*Prospective Damages.*

The damages awarded must include the probable future injury which will result to the plaintiff from the defendant's tort, because more than one action will not lie on the same cause of action.

(1) So, when a young man of twenty-eight, who had been trained as a marine engineer, and intended to follow this profession but had not obtained a post, and was working for his father at a salary of £3 a week, was injured in a railway accident, it was held that £3,000 damages were not excessive. The salary which he would have been probably able to earn was £500 a year, and his physical condition prevented him from earning it. £3,000 represented his prospective loss from this cause (*d*). Illustrations. Bodily injuries.

(2) So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*e*). Injury to trade.

(3) But where the same wrongful act causes damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*f*). Damage to property and person distinct torts.

(4) And if the tort be a continuing tort, the principle does not apply; for in that case a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there *is* a continuing Continuing torts.

(*d*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*e*) *Gregory* v. *Williams*, 1 C. & K. 568.

(*f*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141 [C. A.].

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tort, or merely a continuing **damage,** is often a matter of difficulty to determine.

Successive subsidences caused by one act of defendant.

(5) In the recent case of *Darley Main Colliery Co.* v. *Mitchell* (*g*) the appellants worked their mines too close to the respondent's property, and in consequence some cottages of the respondent were injured in 1868, and were repaired by the appellants. In 1882, in consequence **of the same workings which caused the damage of 1868,** a further subsidence took place, and the respondent's cottages were again injured. The case turned on the question of whether the respondent was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the respondent's land to subside. The excavation was no doubt the cause of the subsidence, but the tort itself was damage resulting from the infringement of the respondent's right of support, and consequently each separate subsidence was a distinct and separate cause of action for which a new action would lie.

ART. 39.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*h*).

Illustrations.

Seduction under guise of courtship.

(1) In seduction, if the defendant had committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right, in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the

(*g*) 11 App. Cas. 127.

(*h*) *Davis* v. *London and North Western Rail. Co.*, 7 W. R. 105.

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better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*i*).

Character of girl seduced.

(2) On the other hand, the previous loose or immoral character of the party seduced is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy (*j*).

Plea of truth in defamation.

(3) In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*k*).

Plaintiff's bad character in defamation.

(4) Evidence of the plaintiff's *general bad character* is allowed in mitigation of damages in cases of defamation. But although evidence of general reputation of bad character is admissible, evidence of rumours and suspicions before the publication of the libel that the plaintiff had done what was charged in it, or of facts showing the misconduct of the plaintiff, is not admissible (*l*).

Insolent trespass.

(5) Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for £500 damages, the court refused to interfere, GIBBS, C.J., saying: "Suppose a gentleman had a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (*m*).

(*i*) *Per* WILMOT, C.J., in *Tullidge* v. *Wade*, 3 Wils. 18.

(*j*) See *Verry* v. *Watkins*, 7 C. & P. 308.

(*k*) *Warwick* v. *Foulkes*, 12 M. & W. 507.

(*l*) See *Scott* v. *Sampson*, 8 Q. B. D. 491, and *Wood* v. *Durham (Earl)*, 21 Q. B. D. 501; and as to giving particulars, see R. S. C., Order XXXVI., r. 37.

(*m*) *Merest* v. *Harvey*, 5 Taunt. 442.

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ART. 40.—*Insurance not to be taken into Account.*

In assessing damages whether for personal injuries or for injuries to property the jury ought not to take into account any sum which may be paid or payable to the plaintiff under any policy of insurance (*n*).

NOTE.—So where a plaintiff sued for damages for personal injuries received in a railway accident, and the jury found as damages £217, and it appeared that the plaintiff was entitled to receive £31 on an accident policy, it was held that the sum awarded by the jury ought *not* to be reduced by the sum of £31. If it were otherwise, the defendant would get the benefit of the plaintiff having insured, and in some cases might have to pay nothing. Insurance is a matter between the insurer and the assured, and ought not to affect the liability of the wrongdoer to pay in full the damages caused by his tort (*n*).

(*n*) *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1, and see *Yates* v. *Whyte*, 4 Bing. N. C. 272, and in cases of death the same rule is applied by the Fatal Accidents Act, 1908.

CANADIAN NOTES TO CHAPTER VIII. OF PART I.

Article 34.

Under the modern Canadian practice it is increasingly common to dispense with juries, and it is not usual for Appellate Courts to interfere with the discretion of the trial judge, unless he has been mistaken in his view of the law.

In *Canadian Pacific Ry. Co.* v. *Jackson* (1915), 52 S. C. R. 281, a jury had awarded the plaintiff, an engine-driver, $27,000 damages for permanent disablement caused by the defendants' negligence: his earnings were $2,100 a year. The majority of the Supreme Court considered the sum to be larger than they personally would have awarded, but declined to interfere with the judgment.

In *Markey* v. *Sloat* (1912), 11 E. L. R. 295; 6 D. L. R. 827, the plaintiff, an illiterate labourer, was awarded by a jury $300 for a false imprisonment of two days' duration, and the verdict was sustained by the Supreme Court. The judgment of Barry, J., contains a careful examination of the principles to be observed in awarding damages in such cases.

In *Iler* v. *Gass* (1909), 7 E. L. R. 98, the plaintiff claimed damages for an assault, which consisted in the defendant, a constable, placing his hand upon her shoulder under the honest, but unwarranted, belief that she was drunk. The incident was immediately followed by an apology. Townshend, C.J., awarded her five dollars damages without costs.

In *Dunn* v. *Gibson* (1912), 8 D. L. R. 297, the plaintiff had been ravished and made pregnant by the defendant, a man of imperfect mental development. The Court of Appeal refused to disturb a verdict of the jury awarding her $5,000 damages.

For a case in which a new trial was ordered on the ground of inadequacy of damages, see *McLeod* v. *Holland* (1913), 13 E. L. R. 509; 14 D. L. R. 634.

ARTICLE 35.

In *Marson* v. *Grand Trunk Pacific Ry. Co.* (1912), 20 W. L. R. 161; 1 D. L. R. 850, the company trespassed upon the plaintiff's land, with the result that he was prevented from extending his pig corral as he had intended, and he lost a number of pigs through keeping them in a confined space. The court refused to limit the damages to the rental value of the land occupied, and held that the plaintiff was entitled to be compensated for the use which he had intended to make of the ground. At the same time it was held that he was under a duty to minimise the damage by curtailing the number of his pigs.

In the case of illegal distress the court will take into consideration, not only the value of the goods, but the injury to the plaintiff's business due to his being deprived of their use: *Jarvis* v. *Hall* (1912), 8 D. L. R. 412.

In *Mackenzie* v. *Scotia Lumber and Shipping Co.* (1913), 47 N. S. R. 115; 12 E. L. R. 464; 11 D. L. R. 729, the defendants' men had inadvertently made temporary use of the plaintiff's raft, which was immediately returned upon the error being discovered. The court held that there had been a technical conversion, but that the plaintiffs could only recover nominal damages.

In *Manitoba Free Press Co.* v. *Nagy* (1907), 39 S. C. R. 340, the newspaper had published an article to the effect that the plaintiff's house was haunted. A majority of the Supreme Court held that the plaintiff was entitled to recover damages to the extent to which the selling value of the house had been depreciated.

Where the defendant had purchased and re-sold timber which had been wrongfully cut on the plaintiff's land the plaintiff was held entitled to recover the whole sum which the defendant received upon the second sale, that being the date of the conversion, and not merely the value of the timber as it stood on the ground: *Greer* v. *Faulkner* (1908), 40 S. C. R. 339.

ARTICLE 36.

In *Lamb* v. *Kincaid* (1907), 38 S. C. R. 516, the defendants had wilfully invaded the plaintiffs' mining locations and taken away gold which they mixed with their own, keeping no account of the amounts obtained from the two

locations. It was held that they were liable to pay for all the gold which they could not positively prove to have been obtained from their own land, and that they were not entitled to deduct the expenses of working and winning the gold.

Article 37.

The decision in *Victorian Railway Commissioners* v. *Coultas* has been followed in certain Canadian cases, but it is now generally recognised that the decision was either unsound in principle, or at any rate requires very careful explanation. The true rule may probably be expressed by saying that no damages are recoverable for mental anguish or for any consequences that cannot be expressed in physical terms: *Henderson* v. *Canada Atlantic Ry.* (1898) 25 O. A. R. 437: *Miner* v. *Canadian Pacific Ry. Co.* (1911), 3 Alta. L. R. 408, a case of negligent delay in the carriage of a corpse. But damages may be recovered for insomnia, neurasthenia, and similar maladies, although there may be no physical consequences of a visible or tangible kind: *Ham* v. *Canadian Northern Ry.* (1912), 20 W. L. R. 359; 1 D. L. R. 377 (affirmed, 7 D. L. R. 812); *Toronto Ry. Co.* v. *Toms* (1911), 44 S. C. R. 268.

It rests with the plaintiff to satisfy the court that the injury, whatever its nature, is the actual result of the defendant's act, and is such as might reasonably have been expected to follow. Thus in *Iler* v. *Gass* (1909), 7 E. L. R. 98, where the defendant had been guilty of a merely nominal assault, the plaintiff failed in an attempt to charge him with responsibility for her subsequent miscarriage.

Article 38.

In *Montreal Street Ry. Co.* v. *Boudreau* (1905), 36 S. C. R. 329, a majority of the Supreme Court held that the operation of a power-house adjoining the plaintiff's premises constituted a continuing series of torts. The plaintiff was therefore debarred from recovering for damage arising earlier than the period of prescription, nor could he recover for future damages, since it was in the power of the defendants to terminate their liability by ceasing to conduct the establishment as a nuisance.

For an example of the assessment of damages in case of permanent disablement see the case of *Canadian Pacific*

Ry. Co. v. *Jackson* (1915), 52 S. C. R. 281, cited in the notes to Article 34. Reference may also be made to *Lloyd* v. *Smith Brothers and Wilson* (1912), 21 W. L. R. 298; 4 D. L. R. 143.

In an action for personal injuries the damages must be assessed once for all, and the plaintiff cannot bring additional actions for subsequently accruing damage, even where he has professed to reserve the right to do so: *City of Montreal* v. *McGee* (1900) 30 S. C. R. 582.

ARTICLE 39.

The award of punitive damages was approved in *O'Connor* v. *City of Victoria* (1913), 11 D. L. R. 577, where the body of a child was wrongfully disinterred from a burial lot, and re-buried without proper reverence and without giving information to the parents. The payment of $40 into court was regarded as an aggravation of the offence.

Exemplary damages may be awarded in an assault case if the defendant has behaved in a brutal and insulting manner, although there may be no physical injury: *McLeod* v. *Holland* (1913), 13 E. L. R. 509; 14 D. L. R. 634.

Recent statutory changes in several provinces have rendered paragraph (1) of the text no longer applicable, and in a case where the plaintiff seeks damages for breach of promise of marriage and for seduction under promise of marriage the jury are not bound to apportion the damages between the two causes of action: *Collard* v. *Armstrong* (1913), 24 W. L. R. 742; 12 D. L. R. 368.

In cases of trespass or conversion, if the defendant has acted in good faith and no actual damage has been caused, nominal damages only will be awarded: *Mackenzie* v. *Scotia Lumber and Shipping Co.* (1913), 47 N. S. R. 115; 12 E. L. R. 464; 11 D. L. R. 729, where the plaintiff was given the costs of the trial and the defendant the costs of the appeal.

ARTICLE 40.

The rule as stated in the text was applied in *Millard* v. *Toronto Ry. Co.* (1914), 31 Ont. L. R. 526, where it is pointed out that the rule does not apply to cases under Lord Campbell's Act: *Grand Trunk Ry. Co.* v. *Jennings* (1888), 13 App. Cas. 800. Cases arising under Article 1056 of the Quebec Code should be distinguished: *Miller*

v. *Grand Trunk Ry. Co.*, [1906] A. C. 187; 15 Que. K. B. 118.

Quebec Law.

It should be observed that under the Quebec Code, in cases where an accident is due to the common fault (*faute commune*) of both parties, the court will apportion the damages between them in accordance with what it considers to be the measure of blame. But where the plaintiff's negligence is the immediate and effective cause of the accident, he cannot claim any damages from the defendant. See *Canadian Pacific Ry. Co.* v. *Fréchette*, [1915] A. C. 871; 24 Que. K. B. 459; *Town of Shipton* v. *Smith* (1920), 29 Que. K. B. 385.

A somewhat similar rule governs cases of collisions at sea, which are now regulated by the Maritime Conventions Act (Imperial) of 1911.

CHAPTER IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS

Definition.

An injunction is an order of a court (*a*) restraining the commission or continuance of some act (*b*).

Interlocutory or perpetual.

Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction, granted summarily on motion (*c*) founded on an affidavit, and before the facts in issue have been formally tried and determined. Such an injunction is granted to restrain the commission or continuance of some act until the court has decided whether a perpetual injunction ought to be granted. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

ART. 41.—*Injuries Remediable by Injunction.*

(1) Wherever a legal right, whether in regard to property or person, exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at

(*a*) A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof (*Ex parte Martin*, 4 Q. B. D. 212; affirmed *sub nom. Martin* v. *Bannister*, *ibid.* 491 [C. A.]).

(*b*) As to mandatory injunctions, and as to the general principles guiding the courts in granting or refusing injunctions, see Strahan and Kenrick's Digest of Equity, Book III., s. 3, and *Andrews* v. *Waite*, [1907] 2 Ch. 510.

(*c*) In the King's Bench Division applications for interlocutory injunctions are made by summons in chambers; *Daniel* v. *Ferguson*, [1891] 2 Ch. 27 [C. A.].

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least not without the necessity of a multiplicity of actions for that purpose (*d*).

Damages instead of injunction.

(2) The court has jurisdiction to give damages instead of granting an injunction, and will generally do so in cases where there are found in combination the four following requirements, viz., where the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*e*).

Interlocutory injunctions.

(3) To entitle a plaintiff to an **interlocutory** injunction, the court must be satisfied that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to relief (*f*). And that, unless an interlocutory injunction is granted, it will become very difficult or impossible to do complete justice at a later stage (*g*).

To restrain publication of libel.

(4) An interlocutory injunction will be granted to restrain the publication of a libel, even though such libel affects the plaintiff in his character only, and not in his business. But an injunction to restrain the publication of a libel will only be granted in the clearest

(*d*) *Imperial Gas Light & Coke Co. Directors* v. *Broadbent*, 7 H. L. Cas. 600.

(*e*) *Per* BAGGALLAY, L.J., in *Sayers* v. *Collyer*, 28 Ch. D. 103 [C. A.], at p. 108; *Serrao* v. *Noel*, 15 Q. B. D. 549 [C. A.]; and *per* A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *City of London Electric Co.*, [1895] 1 Ch. 287 [C. A.], at p. 322.

(*f*) *Per* COTTON, L.J., *Preston* v. *Luck*, 27 Ch. D. 497 [C. A.], at p. 506.

(*g*) *Mogul SS. Co.* v. *McGregor, Gow & Co.* (1885), 15 Q. B. D. 476.

cases (*h*). And not where the libel, however unjustifiable, does not threaten immediate injury to the plaintiff (*i*). **Art. 41.**

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the herbage thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance; for otherwise the plaintiff would have to bring continual actions (*j*). Illustrations. Nuisances.

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*k*).

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be restrained (*l*).

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, according to the ordinary notions of mankind, and to prevent the plaintiff from carrying on his business on the premises as beneficially Interference with light.

(*h*) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A.]; *Monson* v. *Tussaud's, Limited*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671 [C. A.].

(*i*) *Salomons* v. *Knight*, [1891] 2 Ch. 294 [C. A.].

(*j*) *Tipping* v. *St. Helen's Smelting Co.*, L. R. 1 Ch. 66; similarly in the case of a fried fish shop, *Adams* v. *Ursell*, [1913] 1 Ch. 269; *Stearn* v. *Prentice Bros., Ltd.*, [1919] 1 K. B. 394; *Belvedere Co.* v. *Rainham*, [1920] 2 K. B. 487.

(*k*) *Fenwick* v. *East London Rail. Co.*, 20 Eq. 544; but see *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, in which the former case was distinguished.

(*l*) *Soltau* v. *De Held*, 2 Sim. (N.S.) 133. Note these were not bells of an Established church.

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as before, an injunction will be granted in cases in which damages do not afford an adequate remedy (*m*).

Impossibility of compliance.

(5) An injunction will not be granted against a local authority who are committing a nuisance by sewage pollution when it is legally impossible for the authority to obey the terms of the injunction because they have no power to stop up their sewers or prevent persons from using them, or when it is physically impossible. In such cases damages will be given instead (*n*).

Libel.

(6) It was formerly held that an injunction could not be granted to restrain the publication of a personal libel, even where it injuriously affected property (*o*). However, since the Judicature Act, 1873, the court has power to grant an injunction whenever it may appear to be just or convenient (s. 25 (8)). For some time the court was inclined to restrict this power to cases where a libel prejudicially affected property (*p*); but it may now be considered settled that the court **has jurisdiction** to grant injunctions to restrain the publication of all libels (*q*); or even oral slanders (*r*). However, the court is extremely chary of granting **interlocutory** injunctions in cases of libel. As Lord ESHER, M.R., said in *Coulson & Sons* v. *Coulson & Co.* (*s*): "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. *It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.*"

Slander.

(*m*) See *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179; *Andrews* v. *Waite*, [1907] 2 Ch. 500.

(*n*) *Att.-Gen.* v. *Dorking Union*, 20 Ch. D. 595 [C. A.]; *Earl of Harrington* v. *Derby Corporation*, [1905] 1 Ch. 205.

(*o*) *Gee* v. *Pritchard*, 2 Swan. 402; *Clark* v. *Freeman*, 11 Beav. 112; *Prudential Assurance Co.* v. *Knott*, 10 Ch. App. 142.

(*p*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763 [C. A.].

(*q*) See *per* COLERIDGE, L.C.J., in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A.], at p. 283.

(*r*) *Hermann Loog* v. *Bean*, 26 Ch. D. 306 [C. A.].

(*s*) 3 T. L. R. 846 [C. A.], followed in *Collard* v. *Marshall*, [1892] 1 Ch. 578.

ART. 42.—*Public Convenience does not justify the continuance of a Tort.* Art. 42.

It is no ground for refusing an injunction that it will, if granted, do an injury to the public. But although an injunction is granted its operation may be suspended, where it would work an injury to the defendant far outweighing the benefit to the plaintiff, to enable the defendant to provide for the new circumstances (*t*).

(1) Thus, in the case of *Att.-Gen.* v. *Birmingham Borough Council* (*u*), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable. Illustrations.

(2) And where a railway company was forbidden by statute to run trains across a level crossing at a greater speed than four miles an hour, it was held that they must be restrained by injunction, at the suit of the Attorney-General, from running trains at a greater speed than four miles an hour, and that the court could not entertain the question whether the infringement of the statute caused any inconvenience to the public (*v*).

(*t*) *Stollmeyer* v. *Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

(*u*) 4 K. & J. 528. But cf. Illust. (5), p. 88, *supra*.

(*v*) *Att.-Gen.* v. *London and North Western Rail. Co.*, [1900] 1 Q. B. 78 [C. A.].

CANADIAN NOTES TO CHAPTER IX. OF PART I.

Article 41.

In *Leahy* v. *Town of North Sydney* (1906), 37 S. C. R. 464, the municipality attempted to divert the plaintiff's stream for the purpose of a water supply without complying with the statutory procedure for expropriation and compensation. It was held that the plaintiff was entitled to an injunction. See also *Crowther* v. *Town of Cobourg* (1912), 1 D. L. R. 40, where the plaintiff obtained an injunction to stop the defendant from fouling his stream, although he was suffering no immediate damage.

For cases of injunctions to restrain the continuance of nuisances see *Beamish* v. *Glenn* (1916), 36 Ont. L. R. 10; 28 D. L. R. 702; *Oakley* v. *Webb* (1916), 38 Ont. L. R. 151; 33 D. L. R. 35 (where an injunction was refused).

Injunctions will not be granted to restrain the commission of trivial trespasses: *Bertram* v. *Builders' Association of North Winnipeg* (1915), 31 W. L. R. 430; 8 W. W. R. 814.

Where a tenant commits a nuisance, his landlord cannot obtain an injunction unless he can prove injury to the reversion, but adjoining tenants of the same landlord can maintain the action: *MacKenzie* v. *Kayler* (1905), 15 Man. L. R. 660; 1 W. L. R. 290.

In *Quirk* v. *Dudley* (1902), 1 Ont. L. R. 532, the defendant was conducting a mind-reading exhibition, one item in which clearly suggested that the plaintiff had been guilty of the murder of her husband, the reference being to a recent notorious case. The plaintiff obtained an injunction to stop the continuance of this performance.

An injunction will not be granted to restrain a municipality from passing a by-law, if another procedure for attacking it is provided by statute: *Keay* v. *City of Regina* (1912), 5 Sask. L. R. 372; 22 W. L. R. 185; 6 D. L. R. 327.

ARTICLE 42.

For examples of the discretionary power of the court to postpone the operation of an injunction see *Stanford* v. *Imperial Oil Co.* (1920), 56 D. L. R. 402; *Beamish* v. *Glenn* (1916), 36 Ont. L. R. 10; 28 D. L. R. 702.

CHAPTER X.

OF THE LIMITATION OF ACTIONS FOR TORT.

SECTION I.—THE STATUTES OF LIMITATIONS

ART. 43.—*The Principal Periods of Limitation.*

EVERY action for tort must be brought within **six years** from the time when the cause of action is complete (*a*), except—

(a) Trespass to the person by assault or false imprisonment—within **four years** (*b*).

(b) Slander by words actionable *per se*—within **two years**; otherwise, on proof of special damage, within **six years** (*c*).

(c) Actions under Lord Campbell's Act—within **one year** from the death of the deceased (*d*).

(d) Actions under the Employers' Liability Act—within **six months**, or (if injured person be killed) within **one year** of the death (*e*).

(e) Actions for recovery of land—within **twelve years** (*f*).

(f) Against persons protected by the Public Authorities Protection Act, 1893, within

(*a*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93). See Art. 33.

(*e*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4. See Art. 94.

(*f*) See Arts. 134 and 135, where the rule is more fully stated.

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six months of the act or default complained of.

(g) Actions for statutory penalties—within **two years** (*g*).

(h) Actions for damage by collision at sea —within **two years** (*h*).

(i) Infringement of copyright—within **three years** (*i*).

ART. 44.—*Commencement of Period.*

(1) If the cause of action is the doing of a thing, the action must be brought within the prescribed period after the actual doing of the thing complained of.

(2) But if the cause of action is not the doing of something but the damage resulting therefrom, the period of limitation is to be computed from the time when the party sustained the damage (*j*).

(3) And where a tort has been fraudulently concealed by the defendant, and the plaintiff has had no reasonable means of discovering it, the statute only runs from the date of the discovery (*k*).

(4) Where the cause of action is complete but there is no one in existence able to bring the action, or no defendant capable of being sued, time does not run until this bar is removed,

(*g*) Civil Procedure Act, 1833.

(*h*) Maritime Conventions Act, 1911, s. 8.

(*i*) Copyright Act, 1911, s. 10.

(*j*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(*k*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351 [P. C.]; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139.

but no bar arising *after* the cause of action becomes available has any effect in suspending the operation of the statute (*l*). Art. 44.

(5) Where at the time the cause of action arises the plaintiff is a lunatic, or a minor, or the defendant is outside the United Kingdom, the period does not begin to run until this disability ceases (*l*).

Explanation.

The meaning of this rule is, that where the tort is the wrongful infringement of a right, the period of limitation runs immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

Concealed fraud.

The doctrine of "concealed fraud" is an equitable doctrine. It only applies where the tort has been fraudulently concealed **by the person setting up the statute,** or by someone through whom he claims. It would be inequitable to allow a person to take advantage of his own fraud by pleading the statute when that fraud had taken from the plaintiff the chance of bringing his action earlier (*m*).

Illustrations.

Taking away lateral support.

(1) Where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being the owner of the mines under the land of all these persons, so worked them that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses: —*Held*, that A.'s right of action was not barred, as the tort to him was the subsidence caused by the working of the mines, and not the working itself (*n*). And so, too, each fresh subsidence is a new cause of action for which

(*l*) *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351.

(*m*) See *Thorne* v. *Heard*, [1894] 1 Ch. 599 [C. A.]; affirmed, [1895] A. C. 495; *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

(*n*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503.

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a fresh action can be brought within six years of such subsidence (*o*).

Abstracting coal.

(2) But where a trespasser wrongfully worked *the plaintiff's coal*, in consequence of which the surface of the plaintiff's land subsided, it was held that the statute commenced to run from the working and taking away of the plaintiff's coal, and not from the subsidence: on the ground that the working of the coal was a complete tort, and that the subsidence was only a consequence of it (*p*).

Actions for recovery of chattels.

(3) A lease, belonging to the plaintiff, was fraudulently taken from him by his son, and deposited with B. to secure a loan made by B. to the plaintiff's son. The plaintiff was ignorant of this transaction. Subsequently B. became bankrupt, and his trustee in bankruptcy assigned the leasehold premises to the defendant. B. and the defendant were both ignorant of the fraud. The plaintiff then demanded the lease of the defendant, and upon his refusal began an action for wrongful detention and conversion of the lease; to which the defendant pleaded that the fraudulent deposit with B. was made more than six years before action brought, and that, consequently, the action was barred by the Statute of Limitations. The Court of Appeal, however, held that the statute only began to run when the plaintiff had a complete cause of action against the defendant, *i.e., when he demanded the deed and was refused it*, and not from the receipt of the deed by B. In giving judgment, Lord ESHER, M.R., said: "I am of opinion that, in the present case, the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done by the defendant himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations, though more than six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them" (*q*).

(*o*) *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(*p*) *Spoor* v. *Green*, L. R. 9 Ex. 99.

(*q*) *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.]; and see also *Spackman* v. *Foster*, 11 Q. B. D. 99.

Art. 44.

Actions for recovery of land.

(4) There is a great distinction between actions for the recovery of chattels and actions for the recovery of land. For the **Statutes of Limitations do not bar the right to chattels** after the prescribed period, but **only bar the plaintiff's remedy** against the wrongdoer; whereas the **Real Property Limitation Acts bar and extinguish not merely the remedy but also the right** (*r*). Consequently, if a plaintiff has allowed another to remain in possession of land, without acknowledgment, for twelve years, he will be barred, although he may never have demanded delivery up of possession (*s*). Where, however, an intruder goes out of possession of land before acquiring a statutory title, the statute ceases to run, and the title of the true owner remains unaffected, even although he does not himself retake possession until after the expiration of the statutory period (*t*).

ART. 45.—*Continuing Torts.*

Where the tort is continuing, or recurs, a fresh right of action arises on each occasion (*u*).

Illustrations.

False imprisonment.

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem* is a new imprisonment; and therefore the period of limitation commences to run from the last, and not the first day of the imprisonment (*v*).

Trespass.

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass, subject to existing disabilities. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though

(*r*) See 3 & 4 Will. 4, *c.* 27, s. 34, and 37 & 38 Vict. *c.* 57, s. 9.

(*s*) See *Scott* v. *Nixon*, 3 Dru. & War. 388; *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89; and *Moulton* v. *Edmonds*, 1 De G. F. & J. 246.

(*t*) *Agency Co.* v. *Short*, 13 App. Cas. 793; 59 L. T. 677 [P. C.].

(*u*) *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765.

(*v*) *Hardy* v. *Ryle*, 9 B. & C. 608.

Art. 45. there afterwards arises new and unforeseen damage from the existence of the ditch (*w*).

Nuisance. (3) But where the defendants (a highway authority) maintained and kept a ditch so as to be a nuisance, it was held that there was a continuing wrongful act in so keeping it, and that the period of limitation did not run from the first making of it (*x*).

ART. 46.—*Disability.*

Wherever a person is under disability, the statute only runs from the cesser of the disability (*y*). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*z*).

By disability is meant infancy, lunacy, or idiocy, and formerly coverture; but since the Married Women's Property Act, 1882, was passed, the latter is no longer disability.

SECTION II.—PUBLIC AUTHORITIES PROTECTION ACT, 1893.

ART. 47.—*Special limitation in favour of Public Officers and Authorities.*

No action lies against any person:

(a) For any act done in pursuance or execution, or intended execution, of any Act of Parliament or of any public duty or authority, or

(*w*) *Kansas Pacific Railway* v. *Mihlman*, 17 Kansas Reports, 224.
(*x*) *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765.
(*y*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16.
(*z*) *Rhodes* v. *Smethurst*, 4 M. & W. 42; *Lafond* v. *Ruddock*, 13 C. B. 819.

(b) In respect of any neglect or default in the execution of any Act of Parliament, duty or authority, Art. 47.

unless it be commenced within **six months** next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof (*a*).

Continuance of damage.

The period of six months runs from the act, neglect or default complained of: *or* "in case of a **continuance of injury or damage,**" from the ceasing thereof. These words have been held to apply not to cases where damage inflicted once and for all continues unrepaired, but to cases where there is a new damage recurring day by day in respect of an act done, it may be once and for all at some prior time, or repeated, it may be from day to day. For instance, where a local authority discharges sewage day by day into a private lake, that is a "continuance of injury or damage" in respect of which an action lies, although it may have *begun* more than six months before action brought (*b*). The Act applies to servants of the Crown, and is not impliedly repealed by s. 8 of the Maritime Conventions Act, 1911 (*c*).

Illustrations.

(1) A magistrate having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress was put in on the plaintiff's premises. Subsequently the conviction was quashed for want of jurisdiction. The plaintiff has six months *from the date of the wrongful entry* on his premises within which to bring his action for the illegal distress. The wrongful entry, not the order of the magistrate by authority of which it was made, was "the act complained of" (*d*).

(*a*) 56 & 57 Vict. *c.* 61.

(*b*) *Harrington (Earl of)* v. *Derby Corporation*, [1905] 1 Ch. 205, 225.

(*c*) *The Danube II.*, [1920] P. 104.

(*d*) *Polley* v. *Fordham*, [1904] 2 K. B. 345.

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(2) A municipal corporation acquired and worked tramways under their statutory powers. An action for damages for injuries sustained by a passenger on one of their tramcars in consequence of the negligence of their servants must be begun within six months of the negligence complained of (*e*).

Contractor under public authority.

(3) But though the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate, it does not extend to an independent contractor doing work under contract with a public authority for his own profit. So a contractor laying down tram-lines under contract with the London County Council (though the county council would be protected) cannot claim the protection of the Act (*f*). And the Act has been held not to apply to ordinary contracts with a public authority (*g*).

(4) An action was brought against a district board having the control and management of a hospital, for negligence of a nurse, whereby a patient lost his life through being given an overdose of opium. The action was brought by the widow of the patient under Lord Campbell's Act. Under that Act the action must be brought within one year of the death. But it was held that the Public Authorities Protection Act applied, and as the action was not brought within six months of the negligence complained of it was too late (*h*).

(*e*) *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1 [C. A.].

(*f*) *Tilling* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562; *Bradford Corporation* v. *Myers*, [1916] A. C. 242.

(*g*) *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; and see *Clayton* v. *Pontypridd U. D. C.*, [1918] 1 K. B. 219; as to mandamus proceedings, see *R.* v. *Port of London Authority*, [1919] 1 K. B. 176.

(*h*) *Markey* v. *Tolworth Joint Isolation Hospital Board*, [1900] 2 Q. B. 454; and see *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804 [C. A.].

CANADIAN NOTES TO CHAPTER X. OF PART I.

Article 43.

Limitation is a matter entirely dependent upon statute. In the common law provinces of Canada the rules are to a large extent the same as those stated in the text, but the matter is much complicated by federal and provincial statutes dealing with the different branches of the law. These provisions cannot conveniently be summarised within the space available for these notes, and the student must ascertain the period appropriate to each cause of action by consulting the particular statute which governs it.

For Quebec reference should be made to Articles 2183-2270 of the Civil Code and the jurisprudence arising thereunder.

Articles 44 and 45.

In *Chaudière Machine and Foundry Co.* v. *Canada Atlantic Ry. Co.* (1902), 33 S. C. R. 11, the tort consisted in wrongfully making an embankment and raising the level of the street adjoining the plaintiffs' land. This was done in 1888. The plaintiffs acquired the land in 1895, and brought action in 1900, the period of limitation being six years. They argued that there was a recurrent cause of injury through melting snow and rain. The court held that the whole cause of action arose in 1888, and was therefore barred.

The above case may be contrasted with *Town of Truro* v. *Archibald* (1901), 31 S. C. R. 380, affirming 33 N. S. R. 401, where the town had constructed an unlawful drain through the plaintiff's land. The plaintiff, though aware of the trespass, took no action for ten years, when his land caved in. It was held that the trespass was continuous, and that the action was not barred, except with regard to damage suffered more than one year—the statutory period—before the commencement of the action.

In this connection see also *Montreal Street Ry. Co.* v. *Boudreau* (1905), 36 S. C. R. 329 (nuisance by the operation of a power-house).

In criminal conversation cases the period of limitation does not begin to run so long as the adulterous intercourse continues: *King* v. *Bailey* (1901), 31 S. C. R. 338.

It should be noted that the short prescription of personal injuries and other causes of action under Article 2262 of the Quebec Code absolutely extinguishes the right of action, and the court must therefore take judicial notice of the defence, even though it has not been pleaded: *City of Montreal* v. *McGee* (1900), 30 S. C. R. 582.

ARTICLE 46.

In *Hoover* v. *Nunn* (1912), 3 D. L. R. 503, a lunatic in 1875 made a conveyance to her mother, who entered into possession and died in 1887, having devised the lands by will. Upon the death of the mother the Inspector of Asylums entered into possession on behalf of the lunatic, who died in 1908. The present action was brought by her administrator to set aside the conveyance. Falconbridge, C.J., held that the Statute of Limitations did not run against the lunatic during her mother's lifetime, and that she resumed possession through the action of the Inspector in 1887. The deed was set aside.

ARTICLE 47.

Statutes for the protection of public authorities by the introduction of short periods of limitation have been passed by all the provinces, and similar provisions have been enacted in the Exchequer Court Act, the Railway Act, and other Dominion statutes.

Questions of difficulty sometimes arise in determining which of two periods of limitation is applicable to a particular case. In *Small* v. *City of Calgary* (1914), 6 W. W. R. 1192, the municipal charter provided for actions based on any "negligence or default of the city" should be brought within six months: it was held that this restriction did not apply to an action under Lord Campbell's Act, which allows twelve months. See also *B. C. Electric Ry. Co.* v. *Turner* (1914), 19 S. C. R. 470; 18 D. L. R. 430.

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

OF DEFAMATION.

ART. 48.—*Definitions.*

(1) **Defamation** is the publication concerning a person of a statement in words, writing, by pictures or significant gestures, which exposes such person to feelings of hatred, ridicule, or contempt, whereby he suffers injury to his reputation (not to his self-esteem).

(2) A **libel** for which an action will lie is a statement **in writing** (or in print, or in the form of a picture or caricature), published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt, or ridicule (*a*).

(3) **Slander** is an **oral** statement, published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt, or ridicule.

No action will lie for **slander** unless either (a) the plaintiff prove **special damage**, or (b) the slander is calculated to convey an imputation of one of the kinds enumerated in Art. 50.

(*a*) *Per* Lord BLACKBURN, *Capital and Counties Bank* v. *Henty*, in 7 App. Cas. 741, at p. 771.

Art. 48.

Analysis of libel.

The three elements necessary to constitute actionable libel are—

(1) that the words, etc., complained of are defamatory;

(2) that they refer to the plaintiff;

(3) that they were published by the defendant.

If the plaintiff establishes these three points, he makes out a *primâ facie* case.

Analysis of slander.

If the action is for **slander,** he must also prove special damage, unless the slander falls within Art. 50, para. 2, *infra* (*b*).

Defence.

By proving these points, however, the plaintiff only establishes a *primâ facie* case, and in answer to it the defendant is entitled to prove that the publication was

Justification.

justified. He may always justify by showing that the statement complained of was substantially **true.** For the

Truth.

law will not allow a man to recover damages in respect of an injury to a character which he either does not or ought not to possess (*c*). The defendant may also prove that

Privilege.

the publication was privileged, that is, that the occasion of publication was such that he was justified in publishing the words whether true or not. For other defences see Arts. 56 and 57.

ART. 49.—*What is Defamatory.*

(1) Defamatory words or pictures or effigies are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*d*), or to expose him to contempt, ridicule, or public hatred; or to prejudice him in the way of his office, profession, or trade (*e*).

Provided that words published of a corporation are not actionable without proof of special

(*b*) *Jones* v. *Jones*, [1916] 2 A. C. See judgment of Lord Sumner at p. 500.

(*c*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. 272; *Wakley* v. *Cooke* (1849), 4 Ex. 511.

(*d*) *Digby* v. *Thompson*, 4 B. & Ad. 821.

(*e*) *Miller* v. *David* (1874), L. R. 9 C. P. 118.

damage if they refer only to personal character or reputation ; but words calculated to affect a corporation in its property or business may be actionable without proof of special damage (*f*). Art 49.

(2) It is for the court to say whether the words complained of are capable of bearing a defamatory meaning, and for the jury to say whether they in fact bear that meaning (*g*).

(3) The words used must (if nothing is alleged to give them an extended sense) be construed in the sense in which they would be understood by ordinary persons. If they are not capable of a defamatory meaning in that sense they may nevertheless be actionable if it is proved that they would be understood by the persons to whom they were published (*g*).

(4) It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation (*h*).

NOTE.—Words which are not defamatory in their ordinary sense may, nevertheless, convey a defamatory meaning owing to the circumstances in which they are spoken. If I say of a man "he is no better than his father," these words are not in their ordinary sense capable of a defamatory meaning. But if the father is known by the persons to whom the words are used to have been a scoundrel, the words used would convey to them the meaning that the son also is a scoundrel. The words then would be defamatory in the sense in which they were understood by the persons to whom they were addressed. Innuendo.

(*f*) *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133 ; *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*g*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*h*) *Per* Lord BLACKBURN in *Capital and Counties Bank* v. *Henty*. 7 App. Cas. 741, at p. 772 ; *per* Lord LOREBURN in *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20, at p. 23.

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As Lord BLACKBURN says: "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances" (*i*).

Innuendo.

Accordingly, to make out a case when **words not defamatory in their ordinary sense** have been used, the plaintiff must allege and prove an **innuendo**, *i.e.*, he must allege and prove what the words meant to the persons to whom they were used. So in the illustration we have taken, he would allege that the words used meant "that the plaintiff was a scoundrel." He will prove this meaning by showing by evidence that the father was a scoundrel, and that the person using the words and the person to whom they were addressed knew that the father was a scoundrel.

Hence the rule that **whenever the words are not defamatory in their ordinary sense, the plaintiff must allege in his statement of claim an innuendo, and must prove the facts necessary to satisfy the jury that the meaning alleged in the innuendo was the meaning of the words.** But when words are **defamatory in their ordinary sense, no innuendo is necessary.** It is for the court to say whether, taking into account the manner and occasion of the publication and all the circumstances, the words are capable of bearing the meaning alleged in the innuendo (*j*), and for the jury to say whether in fact they bore that meaning.

Illustrations of words defamatory in their ordinary sense.

(1) Thus, describing another as an infernal villain is a disparaging statement sufficient to sustain an action (*k*); and so is an imputation of insanity (*l*); or insolvency, or impecuniousness (*m*); or even of past impecuniousness (*n*);

(*i*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 771.

(*j*) *Stubbs Limited* v. *Russell*, [1913] A. C. 386; *Stubbs Limited* v. *Mazure*, [1920] A. C. 66.

(*k*) *Bell* v. *Stone*, 1 Bos. & P. 331.

(*l*) *Morgan* v. *Lingen*, 8 L. T. 800.

(*m*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201; *Eaton* v. *Johns*, 1 Dowl. (N.S.) 602.

(*n*) *Cox* v. *Lee*, L. R. 4 Ex. 284.

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or of gross misconduct (*o*); or of turf-trickery (*p*); or of ingratitude (*q*). Also the publication in a newspaper of a story of no literary merit as being that of a well-known author has been held libellous (*r*).

(2) So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician that he is a quack. So, also, calling a newspaper proprietor "a libellous journalist" is defamatory (*s*), although it would appear that applying the word "Ananias" to a newspaper does not necessarily impute wilful and deliberate falsehood to its manager and proprietor (*t*).

Words defamatory by innuendo.

(3) Inserting the plaintiffs' names under the head of "first meetings under the Bankruptcy Act" is libellous, the innuendo being that the plaintiffs had become bankrupt, or taken proceedings in liquidation (*u*). And the insertion of the plaintiff's name in a list of persons against whom decrees in absence had been obtained in the Small Debts Court is libellous, the innuendo being the plaintiff's refusal or delay to pay his debts (*v*).

Words not defamatory in their ordinary sense.

(4) When a firm of brewers sent out to their customers a circular in the following terms: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank," it was held that (1) the words were not libellous in their natural meaning, and (2) there were no facts proved which made them capable of bearing the meaning alleged in the innuendo to the effect that the plaintiffs were insolvent. Accordingly, the circular was

(*o*) *Clement* v. *Chivis*, 9 B. & C. 172.
(*p*) *Greville* v. *Chapman*, 5 Q. B. 731, at p. 744.
(*q*) *Cox* v. *Lee*, L. R. 4 Ex. 284.
(*r*) *Ridge* v. *The English Illustrated Magazine, Limited* (1913), 29 T. L. R. 592.
(*s*) *Wakley* v. *Cooke*, 4 Ex. 511.
(*t*) *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284.
(*u*) *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502.
(*v*) *Stubbs Limited* v. *Mazure*, [1920] A. C. 66, and compare this with *Stubbs Limited* v. *Russell*, [1913] A. C. 386.

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not actionable although its effect had been to cause a run on the bank and loss to the plaintiffs (*w*).

(5) And in a later case it was held that a circular sent out by an insurance company for which the plaintiff had acted as agent, to the effect that the agency of the plaintiff had "been closed by the directors," was incapable of meaning that the plaintiff had been dismissed for some reason discreditable to him (as alleged in the innuendo), although some persons might choose to draw this inference, not from the language used, but from the fact referred to (*x*).

Corporations.

(6) It is actionable without special damage to say of a colliery company that the cottages let by the proprietors to their workmen are in an insanitary condition, for such an imputation is likely to injure its reputation in the way of its business (*y*). But inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, it is not libellous without proof of special damage to charge a municipal corporation with corrupt practices (*z*).

Effigy.

(7) The exhibition of the waxen effigy of a person who has been tried for murder and acquitted, in company with the effigies of notorious criminals, may be defamatory (*a*).

ART. 50.—*When Special Damage essential to Action for Slander.*

(1) Except in the following cases spoken words are not actionable without proof of special damage, and the damage complained of must be such as might fairly and reasonably

(*w*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*x*) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68.

(*y*) *South Hetton Coal Co., Limited* v. *North Eastern News Association*, [1894] 1 Q. B. 133 [C. A.].

(*z*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*a*) *Monson* v. *Tussaud's, Limited*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 672 [C. A.].

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have been anticipated from the slander (*b*), *i.e.*, not be too remote (*c*).

(2) No proof of special damage need be given in the case of words imputing:

(a) A criminal offence punishable by imprisonment (*d*);

(b) Some disease tending to exclude the party defamed from society (*e*).

(c) Unchastity in a female (*f*);

(d) Unfitness of the plaintiff for his profession or trade, or office of profit (*g*);

(e) Dishonesty or malversation in a public office of trust (*h*); or

(f) Misconduct in an office of credit or honour such as would be ground for his removal from office (*i*).

Damage must be natural, but not necessarily legal, consequence of slander.

(1) The special damage to support an action for slander must be the **natural and probable consequence** of the defendant's words (*j*), but need **not be their legal consequence,** *i.e.*, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow

(*b*) *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Jones* v. *Jones*, [1916] 2 A. C. 481.

(*c*) *Speake* v. *Hughes*, [1904] 1 K. B. 138; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.

(*d*) *Webb* v. *Beavan*, 11 Q. B. D. 609; *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

(*e*) *Bloodworth* v. *Gray*, 7 Man. & Gr. 334.

(*f*) Slander of Women Act, 1891.

(*g*) *Foulger* v. *Newcomb*, L. R. 2 Ex. 327; *Miller* v. *David* (1874), L. R. 9 C. P. 118.

(*h*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571 [C. A.]; cf. *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797.

(*i*) *Onslow* v. *Horne*, 2 W. Bl. 750.

(*j*) *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407 [C. A.].

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from the speaking of the words, not what *ought* to follow (*k*). Special damage resulting from the repetition of an original slander is too remote (*l*) unless the original slander is uttered to many persons and the subsequent loss may reasonably be attributed to this (*m*). But special damage caused by repetition of a slander is not too remote (1) when the original slander is made to a person who has a legal or moral duty to repeat it; (2) when the person repeating the slander is authorised or intended to do so (*n*).

The special damage must be some temporal loss.

(2) The special damage must be actual temporal loss (*o*), *i.e.*, loss of something pecuniary or capable of being estimated in money (*p*), mere *risk of loss* is not enough (*q*). Thus actual loss of trade or employment is enough (*r*), as also is actual loss of gratuitous hospitality (*s*), for a dinner has some pecuniary value; but loss of friends or society, pain, illness, and suffering, are not enough (*t*). But apparently, if special damage of pecuniary value be shown and the action is therefore maintainable, the damages awarded need not be limited to such special damage but may compensate also for loss to reputation generally (*u*).

Damage caused by plaintiff himself.

(3) If the damage be immediately caused by the plaintiff himself, he cannot sue. For instance, where the plaintiff (a young woman) told the slander to her betrothed, who consequently refused to marry her, it was held that no action would lie against the slanderer (*v*).

Imputation of unchastity.

(4) Formerly, words imputing unchastity to a woman were not actionable without proof of special damage except

(*k*) *Lynch* v. *Knight*, 9 H. L. Cas. 577.

(*l*) *Ward* v. *Weeks* (1830), 7 Bing. 211.

(*m*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.

(*n*) *Derry* v. *Handley* (1867), 16 L. T. (N.S.) 263.

(*o*) *Per* BOWEN, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 [C. A.], at p. 532.

(*p*) *Chamberlain* v. *Boyd*, 11 Q. B. D. 407.

(*q*) *Ibid.*, *per* BOWEN, L.J., at p. 416.

(*r*) *Evans* v. *Harries*, 1 H. & N. 251.

(*s*) *Davies* v. *Solomon*, L. R. 7 Q. B. 112.

(*t*) *Moore* v. *Meagher*, 1 Taunt. 39 [Ex. Ch.]; *Roberts* v. *Roberts*, 5 B. & S. 384; *Allsop* v. *Allsop*, 5 H. & N. 534.

(*u*) *Dixon* v. *Smith* (1860), 5. H. & N. 453.

(*v*) *Speight* v. *Gosnay*, 60 L. J. Q. B. 231 [C. A.].

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in the City of London. But by the Slander of Women Act, 1891 (*w*), this scandalous state of the law has been altered, and it is enacted that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable : provided that the plaintiff shall not recover more costs than damages, unless the judge certifies that there was reasonable cause for bringing the action.

Examples of damage implied from imputation of crime.

(5) The words, "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable *per se* (*x*). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo "of the murder of D."] are a sufficient charge of murder to support an action without proof of special damage (*y*). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (*z*). Nor are words imputing an impossible crime, as "Thou hast killed my wife," who, to the knowledge of all parties, was alive at the time (*a*).

(6) The allegation, too, must be a direct charge of a crime punishable by imprisonment. The crime need not be indictable (*b*), but a charge of having committed a crime punishable by fine only, although it involves a liability to summary arrest, is insufficient, without proof of special damage (*c*). Thus, saying of another that he had forsworn himself is not actionable *per se*, without showing that the words had reference to some judicial inquiry (*d*). But an imputation that the plaintiff had brought a blackmailing action is actionable without proof of special damage, for by

(*w*) 54 & 55 Vict. c. 51.

(*x*) *Jones* v. *Herne*, 2 Wils. 87.

(*y*) *Oldham* v. *Peake*, W. Bl. 959.

(*z*) *Per* Lord ELLENBOROUGH in *Thompson* v. *Bernard*, 1 Camp. 48 ; and *per* Lord KENYON, *Christie* v. *Cowell*, Peake, 4.

(*a*) *Snag* v. *Gee*, 4 Co. Rep. 16 ; *Heming* v. *Power*, 10 M. & W 564, 569.

(*b*) *Webb* v. *Beavan*, 11 Q. B. D. 609.

(*c*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

(*d*) *Holt* v. *Scholefield*, 6 Term Rep. 691.

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inference it imputed to the plaintiff that he was guilty of an indictable offence (*e*).

(7) So words imputing mere suspicion of a crime are not actionable without proof of special damage (*f*).

Imputation of unfitness for society.

(8) Again, to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (*g*).

Imputation of unfitness for business or office of profit.

(9) It is quite clear that, as regards a man's business, or profession, or office, *if it be an office of profit*, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct; the probability of pecuniary loss from such imputation obviates the necessity of proving special damage. But the mere disparagement of a tradesman's goods is not sufficient. The disparagement must be of his unfitness for business (*h*), or some allegation which must necessarily injure his business (*i*). Thus, words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*j*). And similarly where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*k*).

(10) So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*l*). Or of an attorney that "he deserves to be struck off the roll" (*m*). But without special damage it is not actionable to impute to a solicitor insolvency (*n*), or to say "he has

(*e*) *Marks* v. *Samuel*, [1904] 2 K. B. 287 [C. A.].

(*f*) *Simmons* v. *Mitchell*, 6 App. Cas. 156 [P. C.].

(*g*) See *Carslake* v. *Mappledoram*, 2 Term Rep. 473; *Bloodworth* v. *Gray*, 7 Man. & Gr. 334.

(*h*) See *White* v. *Mellin*, [1895] A. C. 154.

(*i*) See *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 R. P. C. 677.

(*j*) *Irwin* v. *Brandwood*, 2 H. & C. 960.

(*k*) *Gallwey* v. *Marshall*, 23 L. J. Ex. 78.

(*l*) *Southee* v. *Denny*, 1 Ex. 196.

(*m*) *Phillips* v. *Jansen*, 2 Esp. 624.

(*n*) *Dauncey* v. *Holloway*, [1901] 2 K. B. 441 [C. A.].

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defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (*o*). But this seems a curious refinement. A similarly absurd distinction has been taken between saying of a barrister "He hath as much law as a jackanapes" (which is actionable *per se*) and "He hath no more wit than a jackanapes" (which is not actionable). The point being that law is, but wit is not, essential in the profession of a barrister (*p*).

Unfitness for offices of honour and credit

(11) With regard to slander upon persons holding mere offices of honour, the loss of which would not necessarily involve a pecuniary loss, the mere imputation of want of ability or capacity is not enough. The imputation to be actionable *per se* must be one which, if true, would show **that the plaintiff ought to be and could be deprived of his office by reason of the incapacity imputed to him.** The implied damage is the risk of loss of the office which he holds. Thus, an imputation of drunkenness against a town councillor is not actionable without proof of special damage. For such conduct, however objectionable, is not such as would enable him to be removed from or deprived of that office, nor is it a charge of malversation in his office (*q*). But a charge of **dishonesty in his office,** against one who holds a public office of trust, such as that of an alderman of a borough, is actionable without special damage, even although there be no power to remove him (*r*).

ART. 51.—*The Libel or Slander must refer to the Plaintiff.*

The plaintiff must prove that the words complained of might reasonably be understood by the persons to whom they are published to refer to him, and that they were understood to refer to him.

(*o*) *Doyley* v. *Roberts* (1837), 3 Bing. N. C. 835.
(*p*) See *per* POLLOCK *arguendo*, *Ayre* v. *Craven*, 2 A. & E. 2, at p. 4.
(*q*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797 [C. A.].
(*r*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571 [C. A.].

Art. 51. It is no defence that the defendant did not intend to refer to the plaintiff (*s*).

Comment. It is not necessary that the plaintiff should be referred to by name. A person may be libelled under a fictitious name or by mere description. But there must be enough to show ordinary readers that the plaintiff is the person about whom the defamatory words are used. So "if a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*t*).

On the other hand, when the words used are such as to indicate a particular person, he can sue even though the defendant did not know of his existence and did not intend to defame him (*s*).

Illustrations. (1) So where an article in a newspaper described certain sales of forged antiques as an attempt at deception and extortion, but did not refer to any particular dealer by name or description, it was held that no dealer could sue for libel, as the libel attacked not an individual but a class (*u*). But if the class be limited in number, then each member may be libelled (*v*).

(2) A newspaper published an article describing a motor festival at Dieppe. The article contained the words: "Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing," etc., and went on to say that Artemus Jones was a churchwarden when at home, but that when on the French side of the Channel "he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." Neither the writer nor the editor of the paper intended to refer to the plaintiff, a well-known barrister named Artemus Jones. The sketch was a mere fancy sketch of life abroad, and the name "Artemus Jones" was used as a fancy name, describing an imaginary character.

(*s*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*t*) *Per* WILLES, J., in *Eastwood* v. *Holmes*, 1 F. & F. 349.
(*u*) *Eastwood* v. *Holmes*, *supra*.
(*v*) *Harrison* v. *Thornborough*, 10 Mod. 196.

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It was proved, however, that readers of the paper thought the article referred to Mr. Jones. The judge directed the jury that if persons reading the article might reasonably think it related to the plaintiff, they might find a verdict for him. The jury found for the plaintiff, and the House of Lords held that he was entitled to judgment (*w*).

ART. 52.—*Publication.*

The making known of a libel or slander **to any person other than the object of it,** is publication in its legal sense, and repetition of defamatory matter is a new publication and a distinct cause of action (*x*).

Publication explained.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*y*). Publication, therefore, being a question of law, it is for the jury to find whether the facts by which it is endeavoured to prove publication are true; but for the court to decide whether those facts constitute a publication in point of law (*z*).

Telegrams and post-cards.

(2) If the libel be contained in a telegram, or be written on a post-card, that is publication, even though they be addressed to the party libelled; because the telegram must be read by the transmitting and receiving officials, and the post-card will in all probability be read by some person in the course of transmission (*a*), unless the statement on the post-card is of such a nature that it would not be understood as defamatory by persons reading it casually (*b*). But

(*w*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*x*) *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185.
(*y*) *R.* v. *Burdett*, 4 B. & Ald. 143.
(*z*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553; *Hart* v. *Wall*, 2 C. P. D. 146.
(*a*) *Williamson* v. *Freer*, L. R. 9 C. P. 393.
(*b*) *Sadgrove* v. *Hole*, [1901] 2 K. B. 1.

Art. 52. where a letter is sent through the post in an unenclosed envelope there is no such presumption of publication (*c*).

Dictating libel.

(3) So, dictating a libellous letter to a typist, and giving it to an office boy to make a press copy, is publication. But if the occasion is privileged the whole course of office routine is privileged (*d*), and the privilege, so long as reasonably used, covers communication to the servants of the recipient (*e*). But malice will always defeat this privilege (*f*).

Husband and wife.

(4) The communication of a libel *by the writer to his own wife* is not "publication," because, in the eye of the law, husband and wife are one person (*g*).

But communication *to the wife of the person defamed* is "publication." Obviously, a man may suffer grievously if imputations on his character are made to his wife (*h*).

ART. 53.—*Repeating Libel or Slander.*

(1) An action will lie for slander or libel against a defendant who is merely a repeater, printer, or publisher of it, unless the defendant can show: (i) That he did not know that he was publishing a libel or slander. (ii) That his ignorance was not due to any negligence on his part. (iii) That in the case of libels he did not know, and had no grounds for thinking, the document was likely to contain libellous matter (*i*).

(*c*) *Huth* v. *Huth*, [1915] 3 K. B. 32.

(*d*) *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524; *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842.

(*e*) *Roff* v. *British & French, etc. Co.*, [1918] 2 K. B. 677; *Edmondson* v. *Birch*, [1907] 1 K. B. 371, *post*, p. 127.

(*f*) *Smith* v. *Streatfield*, [1913] 3 K. B. 764.

(*g*) *Wennhak* v. *Morgan*, 20 Q. B. D. 635.

(*h*) *Wenman* v. *Ash*, 13 C. B. 836.

(*i*) *Emmens* v. *Pottle*, 16 Q. B. D. 354; *Vizetelly* v. *Mudie's Select Library*, [1900] 2 Q. B. 170; *Weldon* v. *Times Book Co.* (1912), 28 T. L. R. 143.

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(2) But in slander, if the special damage arise simply from the repetition, the originator will not be liable (*j*); except (a) where the originator has authorised the repetition (*k*); or (b) where the words are originally spoken to a person who is under a moral obligation to communicate them to a third person (*l*).

Example.

(1) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B., it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorised repetition and not of the original statement (*m*). But if a defamatory letter meant for X. is opened and read by Y., the writer of such letter is not liable if in the circumstances he had no reason to expect Y. would so act, as he has made no publication of his letter to Y. (*n*).

Printing slander.

(2) So the printing and publishing by a third party of oral slander (not *per se* actionable) renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action for libel, although the originator, who merely *spoke* the slander, will not be liable (*o*).

Duty to repeat.

(3) In *Derry* v. *Handley* (*l*), COCKBURN, C.J., observed: "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he had heard to some third person (as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters), the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to

(*j*) *Parkins* v. *Scott*, 1 H. & C. 153.
(*k*) *Kendillon* v. *Maltby*, Car. & M. 402.
(*l*) *Derry* v. *Handley*, 16 L. T. (N.S.) 263.
(*m*) *Ward* v. *Weeks*, 4 Moo. & P. 808.
(*n*) *Powell* v. *Gelston*, [1916] 2 K. B. 615.
(*o*) *McGregor* v. *Thwaites*, 3 B. & C. 24.

Art. 53. which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

Publisher of libel.

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*p*).

Libels in newspapers.

(5) When a libel is published in a newspaper the original composer is liable, for not only does he publish it to the editor and compositors, but he is a participator in the publication to the public. The proprietor who publishes the newspaper by his servants is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. The editor also is usually responsible for the publication (*q*). And of course the same principle applies to libels in magazines and books.

Innocent disseminators.

(6) A more difficult question arises with regard to the dissemination of newspapers and books by newsvendors, booksellers, and lending libraries. *Primâ facie* all these persons take part in publishing libels contained in the papers or books they sell. But a person who merely disseminates a newspaper or book which contains a libel is excused if he can show the facts set out in Art. 53 (1).

ART. 54.—*Justification.*

That the statements complained of as defamatory are true in fact is an absolute defence in an action of defamation.

(1) The defence must set out particulars of the facts relied on, and at the trial must prove the whole of the

(*p*) *Per* BEST, J., *De Crespigny* v. *Wellesley*, 5 Bing. 403.
(*q*) *Per* Lord ESHER in *Emmens* v. *Pottle*, 16 Q. B. D. 354, 357.

libel is substantially true (*r*). Facts occurring *after* publication may be admissible in support of justification (*s*). **Art. 54.**

(2) LITTLEDALE, J., thus explains the principle of the defence of justification: "If the defendant relies upon the truth as an answer to the action, he must plead that matter specially; not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess" (*t*). Explanation of justification.

ART. 55.—*Fair Comment.*

(1) No action will lie if the defendant can prove that the words complained of are a fair and *bonâ fide* comment on a matter of public interest.

(2) The court decides (i) whether the matter commented on is one of public interest; (ii) whether there is evidence that any part of the words complained of go beyond the limits of fair comment.

(3) The jury, if the court is of opinion that there is some evidence that the comment is not fair, finds whether it is so or not.

(4) Matters of public interest include (*inter alia*) literary and dramatic works, political matters, and the public conduct of public men, but not their private conduct (*u*).

(*r*) *Arnold* v. *Bottomley*, [1908] 2 K. B. 151; *Reg.* v. *Labouchere* (1880), 14 Cox. C. C. 419; *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183.

(*s*) *Maisel* v. *Financial Times*, [1915] 3 K. B. 336.

(*t*) See *M'Pherson* v. *Daniels*, 10 B. & C. 263, at p. 272.

(*u*) *Wisdom* v. *Brown* (1885), 1 T. L. R. 412; *Pankhurst* v. *Hamilton* (1887), 3 T. L. R. 500.

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Fair comment not justification.

(1) The defence of fair comment must not be confounded with justification on the one hand, or privilege on the other. If a defendant justifies, he must prove that the *facts* stated in the libel are substantially true. If he succeeds, he makes out his defence; if he fails, he may, nevertheless, successfully contend that the statements are in the nature of comment on a matter of public interest (*v*).

Literary criticism.

(2) If the alleged libel is a criticism of some such matter of public interest as a literary or dramatic work, and the statements are in the nature of comment, the defendant need not make out that they are just; it is enough if he can satisfy the jury that they are fair and honest. Thus, if a critic states of a play that it is "dull, vulgar and degraded," and relies on the defence of fair comment, he will succeed if this is an expression of honest opinion, even though the comment be not such as a jury might think a just or reasonable appreciation of the play (*w*).

But the expressions used must not pass the limits of criticism. Facts are not comment; and if facts are misstated, the defence of fair comment is of no avail, as when in criticising a play the critic stated it was founded on adultery, when in fact there was no incident of adultery in it. This cannot be "comment," fair or otherwise (*x*).

So, too, criticism of a literary work must not be used as a cloak for mere invective or personal imputations not arising out of the subject-matter or based on fact. Statements of this kind are not comment on a literary work, and are libellous if they are defamatory and not true (*y*).

Under these principles, not only books and works of art, but even tradesmen's advertisements, may be fairly criticised (*z*).

(*v*) *Digby* v. *Financial News*, [1907] 1 K. B. 507; *Peter Walker & Son, Ltd.* v. *Hodgson*, [1909] 1 K. B. 256; *Wootton* v. *Sicvier*, [1913] 3 K. B. 499.

(*w*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100.

(*x*) *Merivale* v. *Carson*, 20 Q. B. D. 275; *Hunt* v. *Star Newspaper Co.*, [1908] 2 K. B. 320.

(*y*) *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

(*z*) *Paris* v. *Levy*, 30 L. J. C. P. 11.

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Attacks on public men.

(3) When, however, the defence of fair comment is set up to an attack on the **conduct of public men,** the line is drawn more closely. A public man may be attacked in his **public conduct,** but **not in his private conduct** (except in so far as it touches on his public conduct). And even in regard to his public conduct, if imputations are made which charge a public man with base and sordid motives or dishonesty in the discharge of his duties, the defence of fair comment will not avail unless it is based upon facts which are truly stated, and the facts warrant the imputation made, *i.e.*, the inference drawn from the facts is a reasonable inference from those facts (*a*).

Fair comment and privilege.

(4) On the other hand, fair comment must be distinguished from privilege. If the defence is privilege, and the privilege is established, the plaintiff fails however grossly untrue the libel may be, unless the defendant was actuated by express malice in making it. If (in the case of qualified privilege) there was express malice, the defence of privilege fails. In fair comment no question of malice arises. The only question is, "Is the comment fair, or does it exceed the bounds of fair criticism?" (*b*).

Fair comment is outside the region of libel altogether, whereas a privileged communication is one which is libellous, but for which no action will lie, because it is made in circumstances which make it privileged (*b*).

ART. 56.—*Absolute Privilege.*

No action lies for a statement made upon an occasion which is **absolutely privileged,** although made maliciously. Judicial, Parliamentary and State proceedings are occasions of absolute privilege.

NOTE.—CHANNELL, J. (*c*), thus explains the nature of the absolute privilege in judicial proceedings: "There is no

(*a*) *Campbell* v. *Spottiswoode*, 3 B. & S. 769; *Hunt* v. *Star Newspaper Co.*, [1908] 2 K. B. 309; *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292.

(*b*) See *per* BLACKBURN, J., in *Campbell* v. *Spottiswoode*, 3 B. & S. 769; *Merivale* v. *Carson*, 20 Q. B. D. 275.

(*c*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

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private right of a judge or a witness or an advocate to be malicious. It would be wrong of him, and *if it could be proved*, I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice: that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and to secure their independence that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

Absolute privilege. Parliamentary proceedings.

(1) Speeches in Parliament are absolutely and irrebuttably privileged (*d*); and a faithful report in a public newspaper of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*e*). Statements of witnesses before Parliamentary Committees are also privileged (*f*). Communications relating to affairs of State made by one officer of State to another in the course of duty are also absolutely privileged (*g*).

(2) Reports, papers, votes and proceedings published by order of either House of Parliament are absolutely privileged (*h*).

Judicial proceedings and matters of State.

(3) All judges, inferior as well as superior, are privileged in respect of words spoken in the course of a judicial pro-

(*d*) *Stockdale* v. *Hansard*, 9 A. & E. 1; *Dillon* v. *Balfour*, 20 L. R. Ir. 601.

(*e*) *Wason* v. *Walter*, L. R. 4 Q. B. 73.

(*f*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307.

(*g*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189

(*h*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), ss. 1, 2.

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ceeding, although they are spoken falsely and maliciously, and without reasonable or probable cause (*i*). But the privilege of inferior judges is confined to cases where they have jurisdiction or ought not to have known they lacked jurisdiction (*j*); and this privilege extends to counsel, for words spoken with reference to and in the course of a judicial inquiry, although the words are irrelevant to any issue before the tribunal (*k*). Solicitors acting as advocates have a like privilege (*l*). The report of an Official Receiver made to the court in the winding up of a company is privileged on the same ground, as also is the annual report of the Inspector-General in Bankruptcy to the Board of Trade (*m*).

(4) Statements of witnesses made in the course of proceedings in a court of justice, or in any authorised tribunal acting judicially, or for the purpose of preparing proofs for use in such proceedings (*n*), can never be the subject of an action (*o*); and a military man giving evidence before a military court of inquiry which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*p*). So also is a person who fills in a form required for obtaining a lunacy order (*q*).

ART. 57.—*Qualified Privilege.*

(1) No action lies for a communication made upon an occasion of **qualified privilege** and fairly warranted by it, unless it be proved

(*i*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Law* v. *Llewellyn* [1906], 1 K. B. 487.

(*j*) *Anderson* v. *Gorrie*, [1895] 1 Q. B., at p. 671.

(*k*) *Munster* v. *Lamb*, 11 Q. B. D. 588.

(*l*) *Ibid.*, and *Mackay* v. *Ford*, 29 L. J. Ex. 404.

(*m*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584; *Burr* v. *Smith*, [1909] 2 K. B. 306.

(*n*) *Watson* v. *M'Ewan*, [1905] A. C. 480; *Beresford* v. *White* (1914), 30 T. L. R. 591 [C. A.].

(*o*) *Seaman* v. *Netherclift*, 2 C. P. D. 53; *Barratt* v. *Kearns*, [1905] 1 K. B. 504.

(*p*) *Dawkins* v. *Rokeby*, L. R. 7 H. L. 744.

(*q*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455.

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to have been made maliciously—*i.e.*, with an improper motive (*r*).

(2) Communications are made upon occasions of qualified privilege if made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where (*s*) a common interest exists between the person communicating and the person to whom the communication is made. Such communications, if fairly warranted by any reasonable occasion or exigency and honestly made, are protected for the common convenience and welfare of society (*t*).

(3) It is the duty of the **judge** to determine **whether an occasion is privileged** or not, and if it is, and there is no evidence of actual malice to go to the jury, he must enter judgment for the defendant (*s*).

(4) It is for the **jury** to find **whether a communication** made upon a privileged occasion **is privileged** or not, *i.e.*, whether the communication is fairly warranted by the occasion and made without actual malice (*u*).

(5) If the occasion is privileged the onus is on the plaintiff to prove malice, *i.e.*, "actual malice" or "malice in fact" (*v*), which means in the given circumstances a wrong motive (*w*).

(*r*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

(*s*) *Clark* v. *Molyneux*, 3 Q. B. D., at p. 246; *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100; *Adam* v. *Ward*, [1917] A. C. 309.

(*t*) See *Toogood* v. *Spyring*, 1 C. M. & R., p. 193; *Macintosh* v. *Dun*, [1908] A. C. 390, 398.

(*u*) *Cooke* v. *Wildes*, 5 E. & B. 328; and *per* LOPES, L.J., in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 529.

(*v*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Jenoure* v. *Delmege*, [1891] A. C. 73; *Smith* v. *Streatfield*, [1913] 3 K. B. 764.

(*w*) *Nevill* v. *Fine Arts Insurance Co.*, [1895] 2 Q. B. 171.

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(6) A communication is made maliciously in fact if made from any indirect and wrong motive, such as any unjustifiable intention to inflict injury on the person defamed; but if a person make a statement believing it to be true he will not lose the protection of the privileged occasion, although he have no reasonable grounds for his belief; but excess of privilege may be evidence of malice (*x*).

(7) A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority is privileged if (1) published contemporaneously with such proceedings, and (2) not blasphemous or indecent (*y*).

This privilege is not excluded because the court lacks jurisdiction (*z*). But if the court itself prohibits publication of its proceedings no privilege is given to a violation of the prohibition (*a*). The sittings of licensing justices are not a court for this purpose (*b*).

Comment.

(1) Lord BLACKBURN thus explains the nature of qualified privilege and malice: "A publication calculated to convey an actionable imputation is *primâ facie* a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a **duty**, though perhaps only of imperfect obligation, or a **right** to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it so long as he is acting in compliance with that duty or

(*x*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 434; *Adam* v. *Ward*, [1917] A. C. 309.

(*y*) Law of Libel Amendment Act, 1888, s. 3.

(*z*) *Kimber* v. *Press Association*, [1893] 1 Q. B. 65.

(*a*) Odgers on Libel, 5th ed., 314.

(*b*) *Attwood* v. *Chapman*, [1914] 3 K. B. 275.

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exercising that right, and the burden of proof is on those who allege he was not so acting" (*c*).

Meaning of malice.

(2) "If," says BRETT, L.J., in *Clark* v. *Molyneux* (*d*), "the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. . . . Malice does not mean malice in law, a term of pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing from some wrong motive. So, if it be proved that out of anger or for some other wrong motive the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

Public duty.

Also where the plaintiff had given the widest currency to a statement reflecting on X., a servant of the Crown. The defendant, who was Secretary of the Department to which X. belonged, sent to the Press for publication a letter containing defamatory statements about the plaintiff, refuting the latter's statements and vindicating X. It was held that the defendant's statement was made on a privileged occasion, and that in the circumstances the publication was not unreasonably wide and so the privilege was not lost (*e*).

Social and moral duty.

(3) In *Stuart* v. *Bell* (*f*), the plaintiff was a valet, and while he and his master were staying at Newcastle as the

(*c*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 787.
(*d*) 3 Q. B. D. 237, 246.
(*e*) *Adam* v. *Ward*, [1917] A. C. 309.
(*f*) [1891] 2 Q. B. 341.

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guests of the defendant, who was a magistrate and mayor of Newcastle, the chief constable showed the defendant a letter which he had received from the Edinburgh police stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting a cautious inquiry. The defendant, without making any inquiry, told the plaintiff's master privately that there had been a theft at the hotel and that suspicion had fallen on the plaintiff. It was held that the defendant made the statement to the plaintiff's master in discharge of a moral or social, though not a legal, duty, and that the occasion was privileged. There being no evidence of malice, judgment was given for the defendant.

(4) So advice given in confidence, at the request of another and for his protection, is privileged ; and it seems that the presence of a third party makes no difference (*g*). But it seems doubtful whether a volunteered statement is equally privileged (*h*). Thus the character of a servant given to a person requesting it, is privileged (*i*) ; but a social or moral duty does not cover information furnished for reward by persons or bodies making a business of it (*j*), but inquiries and reports made for the members of a limited trade association are privileged (*k*).

(5) The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*l*).

Statements made by one having an interest to one having a corresponding interest.

(6) A privileged occasion arises, if the communication is of such a nature that it can be fairly said that he who makes it has an interest in making it, and that those to whom it is made have a corresponding interest in having the communication made to them. Thus, where a railway company dismissed one of their guards on the ground that he had been guilty of gross neglect of duty, and published

(*g*) *Taylor* v. *Hawkins*, 16 Q. B. D. 308; *Clark* v. *Molyneux*, 3 Q. B. D. 237.

(*h*) *Coxhead* v. *Richards*, 15 L. J. C. P. 278; *Fryer* v. *Kinnersly*, 33 L. J. C. P. 96; but see *Davies* v. *Snead*, L. R. 5 Q. B. 608.

(*i*) *Gardener* v. *Slade*, 18 L. J. Q. B. 334.

(*j*) *Macintosh* v. *Dun*, [1908] A. C. 390.

(*k*) *London Association for Protection of Trade* v. *Greenlands Limited*, [1916] 2 A. C. 15.

(*l*) *Cowles* v. *Potts*, 34 L. J. Q. B. 247.

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his name in a monthly circular addressed to their servants, stating the fact of, and the reason for, his dismissal, it was held that the statement was made on a privileged occasion, and that the defendants were not liable. For, as Lord ESHER, M.R., said: "Can anyone doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service" (*m*). So joint-owners of property, shareholders of a company and partners have this privilege in furtherance of their common interests (*n*).

Excess of privilege.

(7) However, imputations which, if made to persons having a corresponding interest, would be privileged in the absence of actual malice, cease to be so if spread broadcast. Thus, imputations circulated freely against another in order to injure him in his calling, however *bonâ fide* made, are not privileged. For instance, a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*o*). So, the unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*p*). And where by the defendant's negligence that which would be a privileged communication if made to A., is in fact placed in an envelope directed to B., whereby the defamatory matter is published to B., the defendant will be liable (*q*).

Incidental publication to persons not having interest.

(8) But the privilege is not lost when the defamatory statement is in the reasonable and ordinary course of being copied. So if a solicitor dictates to his clerk a letter,

(*m*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189.
(*n*) *Quartz Hill Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501.
(*o*) *Gilpin* v. *Fowler*, 9 Ex. 615.
(*p*) *Williamson* v. *Freer*, L. R. 9 C. P. 393.
(*q*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54.

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which would be privileged if written by him personally, the solicitor's privilege covers the publication for this purpose to his clerk; and if a company writes to another company a defamatory statement of a third person (which would be privileged), the publication to the clerks who in the ordinary course copy the letter, is privileged (*r*).

Extracts from Parliamentary papers.

(9) Extracts from, and abstracts of, Parliamentary papers and reports are privileged if published *bonâ fide* and without malice (*s*). The reports and papers themselves, if published by authority of Parliament, are absolutely privileged, and actions brought in respect thereof may be stayed (*t*).

Reports of judicial proceedings.

(10) The publication without malice of a fair and accurate report of judicial proceedings before a properly constituted judicial tribunal, exercising its jurisdiction in open court, is privileged (*u*). This is a common-law defence, open to all persons. It is not the same as the absolute privilege given by statute to reports in newspapers when published contemporaneously (*v*).

Reports of *quasi*-judicial proceedings.

(11) Reports of their proceedings published by *quasi*-judicial bodies *bonâ fide* and without any malice, are privileged. For instance, where the General Council of Medical Education and Registration (who are empowered by statute to strike the names of persons off the register of qualified medical practitioners) struck off the plaintiff's name, and, in their annual published report, stated the circumstances which induced them to do so, it was held that in the absence of actual malice the publication was privileged (*w*).

Speeches at county councils, etc.

(12) So, too, there is qualified privilege for speeches made at meetings of district and county councils (*x*).

(*r*) *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842; *Edmondson* v. *Birch*, [1907] 1 K. B. 371; *Roff* v. *British & French, etc. Co.*, [1918] 2 K. B. 677.

(*s*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9,), s. 3; *Mangena* v. *Wright*, [1909] 2 K. B. 958.

(*t*) Parliamentary Papers Act, 1840, ss. 1, 2.

(*u*) *Kimber* v. *Press Association, Limited*, [1893] 1 Q. B. 65.

(*v*) See *ante*, p. 123, para. 7.

(*w*) *Allbutt* v. *General Council, etc.*, 37 W. R. 771.

(*x*) *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431, *Pittard* v. *Oliver*, [1891] 1 Q. B. 474.

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Newspaper reports of meetings, and publication of public notices, etc.

(13) By s. 4 of the Law of Libel Amendment Act, 1888 (*y*), it is enacted that a **fair and accurate report published in any newspaper of the proceedings of a public meeting,** or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a town council, board of guardians, or local authority, constituted under the provisions of any Act of Parliament, or of any meeting of any commissioners, Select Committees of either House of Parliament, and the publication *at the request* of any Government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But the protection intended to be afforded by that section is not available if the defendant has refused to insert, in the newspaper in which the matter complained of appeared, a reasonable explanation or contradiction by, or on behalf of, the plaintiff. Nor is it available to protect fair and accurate reports of statements made to the editors of newspapers by private persons as to the conduct of a public officer (*z*).

ART. 58.—*Apology.*

(1) At common law the fact that the defendant has apologised for having defamed the plaintiff is no defence.

(2) By statute the defendant **in any action for libel or slander** may prove **in mitigation of damages** that he made or offered an apology before the commencement of the action, or as soon afterwards as he had an opportunity, if the action was begun before he had an opportunity of doing so (*a*).

(*y*) 51 & 52 Vict. c. 64.
(*z*) *Davis* v. *Shepstone*, 11 App. Cas. 187.
(*a*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1.

Art. 58.

(3) In any action for libel contained in any newspaper or other periodical publication, it is a good defence that such libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper a full apology, or, if the paper or periodical is published at intervals exceeding one week, that he offered to publish the apology in any newspaper or periodical selected by the plaintiff (*b*). With this defence there must be payment of money into court by way of amends, and *no other defence can be pleaded* (*c*).

NOTE.—If the defendant intends to give evidence of an apology in mitigation of damages, he must give notice with his defence (*d*). The Act of 1888 also enables a defendant, in the case of a libel *in a newspaper*, to give evidence in mitigation of damage that the plaintiff has recovered, or brought actions for, damages in respect of other libels to the same effect (*e*).

ART. 59.—*Slander of Title and Slander of Goods.*

(1) Slander of title is a false statement disparaging a person's title to property.

(2) Slander of goods is a false statement disparaging goods manufactured or sold by another.

(3) The slander may be oral or in writing or print.

(*b*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2.
(*c*) Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2; R. S. C., Order XXII., r. 1.
(*d*) Libel Act, 1843, s. 1.
(*e*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.

Art. 59.

(4) An action for slander of title or slander of goods will lie if—

(i) The statement is false;

(ii) The publication is malicious;

(iii) The publication causes special damage (*f*).

NOTE.—(1) Actions of this kind are not properly actions for libel or slander. The cause of action is for damage wilfully and intentionally done without just occasion or excuse (*g*). The statement to be actionable need not be defamatory of the person (*h*), and it will be observed that even though the statement is in writing, it is not actionable without proof of special damage (*i*). There must also always be evidence of actual malice, or at least absence of reasonable cause for making the statement (*j*).

Special damage.

(2) In every case of this kind there must be proof of actual damage, *i.e.*, of actual and temporal loss, resulting from the slander. In the case of slander of goods, loss of custom and falling off in the sales is the usual kind of special damage Where the slander is of title to property, real or personal, the special damage may be the diminished value of the property by reason of difficulty of selling or letting it (*k*).

Puffing one's own goods.

(3) For a person in trade to puff his own goods or proclaim their superiority over those of his rivals is not actionable, even though the statement is untrue and made maliciously, and causes damage to the rivals. A mere puffing of one's own goods, without active disparagement of a rival's goods, gives no ground of action, for the rival's goods have not been decried (*l*).

(*f*) *Lyne* v. *Nicholls* (1906), 23 T. L. R. 86; *Griffiths* v. *Benn* (1911), 27 T. L. R. 346.

(*g*) *Per* BOWEN, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, [C. A.], at p. 527.

(*h*) *Ibid.*

(*i*) *White* v. *Mellin*, [1895] A. C. 154.

(*j*) *Wren* v. *Wild*, L. R. 4 Q. B. 730; *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86 [C. A.]; *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Halsey* v. *Brotherhood*, 19 Ch. D. 386 [C. A.].

(*k*) *White* v. *Mellin*, *supra*; *Ratcliffe* v. *Evans*, *supra*.

(*l*) *White* v. *Mellin*, *supra*; *Alcott* v. *Millar's Karri Forests, Limited* (1905), 91 L. T. 722.

CANADIAN NOTES TO CHAPTER I. OF PART II.

Article 48.

The general propositions stated in the text hold good in the English law provinces of Canada, subject to some statutory modifications intended mainly for the protection of newspapers.

The Quebec Code contains no articles dealing specifically with the subject of defamation, and actions under this head must be brought under the general words of Article 1053. In practice this means that the development of the law on this subject has been left to the courts. For the most part, though not without exception, common law principles have been followed. The distinction between libel and slander, involving the consequences stated in the text, is unknown to the law of Quebec.

The following definition by Dalloz (vo. *Presse, Outrage, Diffamation* n. 215) is cited with approval by Beauchamp, vol. i, p. 1004:—

"L'on distingue la diffamation de l'injure; la première renferme l'imputation d'un fait qui porte atteinte à l'honneur ou à la considération de quelqu'un: la seconde est toute expression outrageante, terme de mépris ou invective qui ne renferme l'imputation d'aucun fait."

Article 49.

It scarcely seems profitable to multiply instances of the meaning attached to particular expressions in individual decisions, since the question of innuendo obviously depends entirely upon the special circumstances of each case. To take one example, in *Bordeaux* v. *Jobs* (1913), 6 Alta. L. R. 440, the words complained of were: "He has a wife in the States." Normally there would be nothing defamatory about such a remark, but since it happened that the words were addressed to the father of the plaintiff's fiancée, and caused the postponement of his engagement, they gave him a cause of action.

Words may be defamatory, although they may only discredit the plaintiff in the eyes of persons holding certain

religious or political views. In *Noyes* v. *La Cie. d'Imprimerie et du Publication du Canada* (1890), M. L. R., 6 S. C. 370; 13 L. N. 345, it was held actionable to accuse a parliamentary candidate of being an Orangeman. The charge of being a Freemason is defamatory of a French Roman Catholic candidate: *Brunelle* v. *Girard* (1913), 23 Que. K. B. 427.

To accuse a newspaper of selling its political influence is actionable at the suit of the corporation which owns the paper: *Albertan Publishing Co.* v. *Munn,* 13 Alta. L. R. 533; (1918), 2 W. W. R. 761.

A non-commercial corporation may maintain an action for libel, if the words have reference to the purposes for which the corporation exists: *Chinese Empire Reform Association* v. *Chinese Daily Newspaper Publishing Co.* (1907), 13 B. C. R. 141.

Article 50.

Statutes more or less similar to the English Slander of Women Act have now been passed by all the common law provinces. In most cases the plaintiff is only allowed to recover nominal damages in the absence of proof of special damage, but a verdict for nominal damages is sufficient to carry costs. For examples see *Mitchell* v. *Clement,* 14 Alta. L. R. 248; (1919), 1 W. W. R. 183; *Stewart* v. *Sterling* (1918), 42 Ont. L. R. 477; 42 D. L. R. 728.

In *Rutledge* v. *Astell* (1908), 1 Sask. L. R. 389, it was held actionable to accuse the plaintiff, a horse-dealer, of drugging his horses for sale.

The rules laid down in this article have no application in the law of Quebec.

Article 51.

In *Germain* v. *Ryan* (1918), 53 Que. S. C. 543, the plaintiff claimed damages for certain offensive language which the defendant had used concerning the French-Canadians generally. It was held that he could not recover without proving that the abuse in question was specially directed towards himself.

If the plaintiff makes false accusations against a particular community with the object of inciting his hearers to boycott and injure them, individual members of the community may have a right of action: *Ortenberg* v.

Plamondon (1914), 24 Que. K. B. 69, 385. Cross, J., in this case held that the liability was not for defamation, but for damage maliciously caused.

In *Chiniquy* v. *Bégin* (1912), 41 Que. S. C. 261; 7 D. L. R. 65, affirmed 24 Que. K. B. 294, the defendant was held to have libelled the plaintiff by asserting that her parents were not married, although he was unaware of the plaintiff's existence.

ARTICLE 52.

The rule laid down in *Pullman* v. *Hill* regarding publication to stenographers was applied in *Puterbaugh* v. *Gold Medal Furniture Manufacturing Co.* (1904), 7 Ont. L. R. 582. See also *Moran* v. *O'Regan* (1907), 38 N. B. R. 189; *Quillinan* v. *Stuart* (1917), 38 Ont. L. R. 623; 35 D. L. R. 35. In some American States the courts appear to regard communication to a stenographer as being an absolute publication, but the decisions are not entirely uniform.

In *Dominion Telegraph Co.* v. *Silver* (1882), 10 S. C. R. 238, the telegraph company was held liable for the transmission over its lines of a message, which on the face of it was defamatory. Upon this point there is some conflict of opinion among the American decisions.

In *Rudd* v. *Cameron* (1912), 8 D. L. R. 622, the plaintiff had employed detectives to investigate the origin of certain slanderous rumours that were in circulation concerning him, and the detectives induced the defendant to repeat them. As the detectives had acted on their own discretion it was held that there had been a publication for which the defendant was responsible.

The artificial theory of husband and wife being "one person in the eye of the law" is unknown in the law of Quebec, but the same result is reached by holding that communications between husband and wife are absolutely privileged: *Soullières* v. *de Répentigny* (1886), M. L. R., 2 S. C., 414. It might be more reasonable to base the common law rule upon the same grounds instead of explaining it by a fantastic reason which has no foundation in fact.

ARTICLE 53.

In *Hertlein* v. *Hertlein* (1912), 9 D. L. R. 72; 22 W. L. R. 959, the defendant anonymously communicated

to the plaintiff, his brother, accusations which he had heard concerning the plaintiff's wife. The court held that his mode of action destroyed any claim of privilege, and that he was responsible for the libel.

The fact that defamatory statements contained in a newspaper are already matters of notoriety may properly be considered in mitigation of damages: *Patterson* v. *Edmonton Bulletin Co.* (1908), 1 Alta. L. R. 477; *Carrington* v. *Mosher* (1912), 46 Que. S. C. 484.

ARTICLE 54.

In *Gorenlock* v. *London Free Press Co.* (1915), 35 Ont. L. R. 79; 26 D. L. R. 681, it was stated in the newspaper that the plaintiff had been fined for assaulting the starter on a race-course. The fact that he had been fined for minor irregularities on another occasion was held to be no justification.

The publication must be taken as a whole in order for its truth or falsehood to be judged: *Robert* v. *Herald Co.* (1913), 10 D. L. R. 20.

In Quebec, where the old French law has been accepted without any statutory changes, truth is not an absolute defence, but may be pleaded to shew the good faith of the defendant and to mitigate the damages: see *Bois* v. *Deschêne* (1914), 48 Que. S. C. 178, where the authorities are reviewed.

ARTICLE 55.

In *Wade* v. *The News-Advertiser* (1917), 24 B. C. R. 260; 2 W. W. R. 1134, the plaintiff had attacked the government in a paper which he edited, and the defendant replied by attacking the plaintiff's conduct as a government official in the Yukon sixteen years earlier. The court held that this revival of ancient controversies could not be justified as fair comment.

ARTICLE 56.

The principle of the rule laid down in the text was extended beyond the law of defamation in the curious case of *Le Club de Garnison de Québec* v. *Lavergne* (1917), 27 Que. K. B. 37. The plaintiff had made a speech in the legislature which was considered by many to be of a dis-

loyal nature, and was in consequence expelled from his club. A majority of the Court of King's Bench held that the action of the club was a violation of the absolute privilege accorded to parliamentary proceedings, and that the plaintiff was therefore entitled to retain his membership.

In Quebec words spoken by witnesses and others in the course of judicial proceedings are only privileged in so far as they are relevant to the subject-matter of the case: *Honan* v. *Parsons* (1911), 13 Que. P. R. 363; *Carrington* v. *Russell* (1912), 13 Que. P. R. 353.

ARTICLE 57.

Although the occasion may be one of qualified privilege, yet if there is evidence that the defendant did not actually believe the charge which he made against the plaintiff, the jury may be justified in inferring malice from such facts: *Woods* v. *Plummer* (1907), 15 Ont. L. R. 552.

A letter written to a magistrate charging the plaintiff with fraud is not privileged unless it is intended to be the initial step in judicial proceedings: *Lowther* v. *Baxter* (1890), 22 N. S. R. 372.

A physician is privileged in advising his patient to patronise one drug store rather than another, provided that he acts in good faith: *Aumont* v. *Cousineau* (1911), 18 Rev. de Jur. 271.

In the common law provinces there is now a large amount of legislation intended to protect the freedom of the press in the honest performance of its duties. In general the statutes enact that only actual damage shall be recovered, provided that the news is of public interest and is published in good faith, and that the person defamed is given a fair opportunity of refuting the attack upon him in the columns of the defendants' paper. These statutes which the student should study in detail, go farther in some respects than the English legislation cited in the text.

In Quebec there has been no such legislation. So far as the matter is one of constitutional principle, it is governed by the English law existing at the date of the cession. So far as it is purely a matter of private right, the French law applies. See *Maillé* v. *La Cie. de Publication du Canada* (1913), 43 Que. S. C. 397.

ARTICLE 59.

In *Manitoba Free Press Co.* v. *Nagy* (1907), 39 S. C. R. 340, the defendants printed in their paper a statement that the plaintiff's house was haunted, and a sale of the property fell through in consequence. Upon the question of malice Davies, J., said: "The article complained of was false and was published by defendant recklessly without regard to consequences, and in this may be found the absence of good faith which imports malice, which is an essential condition of liability." The plaintiff recovered damages to the extent of the depreciation in the value of the property.

CHAPTER II.

OF MALICIOUS PROSECUTION.

ART. 60.—*General Rule.*

(1) Malicious prosecution of criminal proceedings consists in instituting unsuccessful criminal proceedings maliciously and without reasonable or probable cause (*a*).

(2) Malicious prosecution of criminal proceedings causing actual damage to the party prosecuted is a tort, for which he may maintain an action.

(3) Malicious prosecution will lie against those who maliciously, and without reasonable and probable cause, petition to have a person adjudicated bankrupt or attempt to have a company wound up (*b*).

(4) It is actionable to procure the arrest and imprisonment of a person by means of civil or criminal judicial process if such process be instituted maliciously and without reasonable or probable cause (*c*).

(5) Malicious execution against property. Where an action is brought maliciously, and without reasonable and probable cause, to issue

(*a*) See *Churchill* v. *Siggers*, 3 E. & B. 929, 937; *Johnson* v. *Emerson*, L. R. 6 Ex. 329; and *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674 [C. A.].

(*b*) *Quartz Hill Mining Co.* v. *Eyre*, *supra*.

(*c*) *Churchill* v. *Siggers* (1854), 3 E. & B. 929.

Art. 60. execution against the property of a judgment debtor malicious prosecution will lie (*d*).

Distinct from false imprisonment.

The distinction between malicious prosecution and false imprisonment has already been pointed out. Prosecution consists in setting a judicial officer in motion. Imprisonment consists in causing a person to be arrested or imprisoned without the intervention of a judicial officer.

Essentials.

To sustain this action the following essentials must exist :—

(1) Defendant must have actively instigated and carried on some proceedings of the classes above mentioned, and such proceedings must come before a judicial officer.

(2) The defendant must have acted maliciously (*i.e.*, with an improper motive and not to further the ends of justice).

(3) There must be a want of reasonable and probable cause.

(4) The proceedings must have ended in favour of the person proceeded against (unless of their nature this is not possible).

(5) Damage to the party proceeded against—in some cases this is implied.

ART. 61.—*Prosecution by the Defendant.*

The defendant must have instigated the prosecution or continued it, and need not be a party to it (*e*). But if the prosecution is taken by the authorities it is not enough that the defendant merely furnished information (*f*). And if criminal the proceedings need not be punishable by imprisonment in the first instance (*g*).

(*d*) *Churchill* v. *Siggers*, cf. *Clissold* v. *Cratchley*, [1910] 2 K. B. 244.

(*e*) *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329.

(*f*) *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505 ; *Sewell* v. *N. T. Co.*, [1907] 1 K. B. 557.

(*g*) *Wiffen* v. *Bailey*, [1915] 1 K. B. 600.

Art. 61.

Illustrations.
Mistake of magistrate.

(1) Thus, if a person *bonâ fide* lays before a magistrate a statement of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*h*). But if a person goes before a magistrate and makes a specific charge against another, as by swearing an information that that other has committed a criminal offence, he is the person prosecuting, for he and not the magistrate has set the law in motion. So, too, if a person instructs a solicitor to prosecute, he is liable for the consequences if he does it maliciously and without reasonable and probable cause.

(2) It has been held that if a person acting *bonâ fide* swears an information before a magistrate, under s. 10 of the Criminal Law Amendment Act, 1885, that he has reasonable grounds for suspecting that a woman or girl is detained for immoral purposes, and thereupon the magistrate issues a search-warrant, the person swearing the information is not a prosecutor, as the magistrate acts judicially upon such information, and the decision of the magistrate that there is reasonable cause for suspicion protects the person giving the information (*i*).

ART. 62.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*j*).

(2) The jury find the facts on which the question of reasonable and probable cause depends; but the judge determines whether those

(*h*) *Wyatt* v. *White* 29 L. J. Ex. 193; *Cooper* v. *Booth*, 3 Esp. 135, 144.

(*i*) *Hope* v. *Evered*, 17 Q. B. D. 338.

(*j*) *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

Art. 62. facts do constitute reasonable and probable cause (*k*).

(3) No definite rule can be laid down for the exercise of the judge's determination (*l*); but the defendant will be deemed to have had reasonable and probable cause for a prosecution where (a) he took reasonable care to inform himself of the true facts; (b) he honestly, although erroneously, believed in his information (*m*), and (c) that information, if true, would have afforded a *primâ facie* case for the prosecution complained of (*n*).

Burden of proof.

Note, that in both malicious prosecution and false imprisonment the question of what amounts to reasonable and probable cause is for the judge. But there is this important difference, that in malicious prosecution it is for the plaintiff to prove the absence of reasonable and probable cause; whereas in false imprisonment, the imprisonment is *primâ facie* wrongful, and it is for the defendant, if he can, to prove that he had reasonable and probable cause.

Reasonable and probable cause defined.

In *Hicks* v. *Faulkner* (*o*), HAWKINS, J., says: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead an ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was **probably** guilty of the crime imputed. There must be first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief must be based upon

(*k*) *Panton* v. *Williams*, 2 Q. B. 169 [Ex. Ch.]; *Cox* v. *Eng. Bank*, [1905] A. C. 168.

(*l*) *Lister* v. *Perryman*, L. R. 4 H. L. 521.

(*m*) *Heslop* v. *Chapman* (1853), 23 L. J. Q. B. 49.

(*n*) See *Abrath* v. *North Eastern Rail. Co.*, *ubi supra*.

(*o*) 8 Q. B. D. 167, at p. 171.

Art. 62.

reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

A man who makes a criminal charge against another, cannot absolve himself from considering whether the charge is reasonable and probable by delegating that question to an agent, even although that agent be presumably more capable of judging. Thus, the opinion of counsel as to the propriety of instituting a prosecution will not excuse the defendant if the charge was in fact unreasonable and improbable. For, as HEATH, J., said in *Hewlett* v. *Cruchley* (*p*), "it would be a most pernicious practice if we were to introduce the principle that a man, by obtaining the opinion of counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution."

With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would seem that although he must not act upon mere tittle-tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the hearsay (*q*). But as circumstances are infinite in variety, it is quite impossible to lay down any guiding principle as to what steps a person ought reasonably to take for informing himself of the truth before instituting a prosecution.

ART. 63.—*Malice.*

Malice means improper motive, that is to say, any motive other than the desire of bringing a person to justice (*r*). Malice is a question of

(*p*) 5 Taunt. 277, at p. 283.
(*q*) *Lister* v. *Perryman*, L. R. 4 H. L. 521.
(*r*) *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

Art. 63. fact, and the absence of reasonable and probable cause does not necessarily infer malice (*s*); nor does the acquittal of the person proceeded against (*t*).

Illustrations.

Improper motives.

(1) If a person prosecutes another to prevent that other bringing actions against him (*u*), or to stop the mouth of a witness (*v*), or to frighten others and thereby deter them from committing depredations on the prosecutor's property (*w*), all these are indirect and improper motives which may constitute malice. So, too, if a man presents a petition to wind up a company with a view to recovering from it money paid by him for shares in the company (*x*).

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong and had no just cause of complaint, malice may be presumed (*y*)

Honest mistake.

(3) In *Brown* v. *Hawkes* (*z*) it was pointed out that a prosecutor may act without reasonable and probable cause and yet not be malicious. Stupidity and malice are not the same thing; if the defendant honestly believed in the plaintiff's guilt, and there is no evidence that he was actuated by any improper motive, even though he had not taken care to inform himself of the facts, and had no reasonable and probable cause for prosecuting, yet he cannot be said to have acted maliciously. Honest belief rebuts the inference of malice from absence of reasonable and probable cause.

Bad memory.

(4) So, too, where the defendant has honestly and *bonâ fide* instituted the prosecution, he is not liable, although

(*s*) *Brown* v. *Hawkes*, [1891] 2 Q. B. 727; *Bradshaw* v. *Waterlow*, [1915] 3 K. B. 527.

(*t*) *Corea* v. *Peiris*, [1909] A. C. 549.

(*u*) *Leith* v. *Pope*, 2 W. Bla. 1327.

(*v*) *Haddrick* v. *Heslop*, 12 Q. B. 267.

(*w*) *Stevens* v. *Midland Rail. Co.*, 10 Ex. 352, 356.

(*x*) *Quartz Hill Co.* v. *Eyre* (1883), 11 Q. B. D. 687.

(*y*) *Hinton* v. *Heather*, 14 M. & W. 131.

(*z*) [1891] 2 Q. B. 718 [C. A.].

owing to a defective memory he has wrongly accused the plaintiff (*a*). **Art. 63.**

(5) Whether a corporation can be guilty of malicious prosecution was, until recently, not free from doubt, it being said that a corporation having no mind cannot entertain malice (*b*). In *Cornford* v. *Carlton Bank* (*c*), DARLING, J., held that if a corporation institutes a prosecution acting on motives which in an individual would amount to malice, the corporation may be said to have prosecuted maliciously, and it is now well established that an action of malicious prosecution will lie against a corporation. Malice in a corporation.

ART. 64.—*Failure of the Prosecution.*

It is necessary to show that the proceeding has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*d*). But the plaintiff does not need judicial determination of his innocence; the absence of judicial decision of his guilt is enough, *e.g.*, by discontinuance (*e*), or the quashing of a conviction on some technical ground (*f*).

(1) This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where the result of the prosecution cannot be appealed (*g*). As CROMPTON, J., said, in *Castrique* v. *Behrens* (*h*), "there is no doubt on principle and on the authorities that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the Explanation of reasons for rule.

(*a*) *Hicks* v. *Faulkner*, 8 Q. B. D. 167.

(*b*) See *per* Lord BRAMWELL in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

(*c*) [1899] 1 Q. B. 392. In the Court of Appeal ([1900] 1 Q. B. 22 [C. A.]) it was conceded that the action would lie; and see *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.

(*d*) *Basèbè* v. *Matthews*, L. R. 2 C. P. 684.

(*e*) *Watkins* v. *Lee*, 5 M. & W. 270.

(*f*) *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329.

(*g*) *Basèbè* v. *Matthews*, L. R. 2 C. P. 684.

(*h*) 30 L. J. Q. B. 163, at p. 168.

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damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

(2) Upon the same principle, an action for trespass by wrongfully causing execution to be issued under a judgment obtained by fraud or irregularity, will not lie until the judgment has been set aside. It is not competent to any person to aver anything contradicting or impeaching the judgment as long as it stands (*i*).

ART. 65.—*Damage.*

In order to support an action for malicious prosecution, it is necessary that some damage result to the plaintiff as the natural consequence of the prosecution complained of, but this will be presumed in cases which of their nature involve damage to reputation or possible loss of liberty or credit (*j*).

Damage need not be pecuniary.

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*k*).

(*i*) *Huffer* v. *Allen*, L. R. 2 Ex. 15; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*j*) *Quartz Hill Co.* v. *Eyre, supra*; *Wiffen* v. *Bailey*, [1915] 1 K. B. 600.

(*k*) Mayne's Treatise on Damages, p. 345.

CANADIAN NOTES TO CHAPTER II. OF PART II.

Articles 60-65.

Upon the subject of malicious prosecution the student should be careful to note an important point of difference between the Quebec law and that of the other provinces. The common law provinces follow the rule as laid down in Article 63 of the text, and hold that malice forms a distinct and essential part of the plaintiff's case, not to be identified with absence of reasonable and probable cause: *Scott* v. *Harris* (1918), 14 Alta. L. R. 143; (1918), 3 W. W. R. 1028; 44 D. L. R. 737.

In Quebec, on the other hand, following the French law, it has been held that absence of reasonable and probable cause is in itself sufficient to sustain the action without independent evidence of malice. The student should carefully read the judgement of Archambeault, C.J., in *Canadian Pacific Ry. Co.* v. *Waller* (1912), 1 D. L. R. 47; 19 Can. Cr. Cas. 190, in which the rules of the two systems are compared.

It may further be observed that the Quebec law differs from the common law in permitting an action for the malicious institution of purely civil proceedings: see *Montreal Street Ry. Co.* v. *Ritchie* (1889), M. L. R. 5 Q. B. 77. Such actions are, however, very uncommon.

On the respective functions of judge and jury in cases of malicious prosecution see *Archibald* v. *Maclaren* (1892), 21 S. C. R. 588.

The Ontario Judicature Act (3-4 Geo. V. c. 19, s. 62) provides: "In actions for malicious prosecution the judge shall decide all questions, whether of law or fact, necessary for determining whether or not there was reasonable and probable cause for the prosecution."

The student may refer with advantage to an article by Mr. C. B. Labatt in 35 Canada Law Journal, p. 545.

CHAPTER III.

OF MAINTENANCE.

ART. 66.—*Definition.*

(1) Maintenance is the unlawful assistance, by money or otherwise, proffered by a third person, to either party to a civil suit, to enable him to prosecute or defend it.

(2) Assistance of another in a suit is not unlawful if (a) the maintainer has a common interest in the action with the party maintained; or (b) the maintainer is actuated by motives of charity, *bonâ fide* believing that the person maintained is a poor man oppressed by a rich one.

(3) Special damage must be proved and the success of the maintained litigation is no bar to an action for maintenance (*a*).

Distinguished from malicious prosecution.

Maintenance differs from malicious prosecution in four respects :

(a) It applies to civil, not criminal proceedings.
(b) It consists not in instituting proceedings on one's own behalf, but in assisting another.
(c) Malice is not a necessary ingredient.
(d) It is not necessary to prove that the proceedings terminated in favour of the person who is the person who brings the action of maintenance.

Illustrations.

(1) Thus, in the well-known case of *Bradlaugh* v. *Newdegate* (*b*), the plaintiff, having sat and voted as a member

(*a*) *Oram* v. *Hutt*, [1914] 1 Ch. 107; *Neville* v. *London Express Newspaper, Limited*, [1919] A. C. 368.
(*b*) 11 Q. B. D. 1.

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of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for so sitting and voting. C. was a person of insufficient means to pay the cost in the event of the action being unsuccessful:—*Held*, that the defendant and C. had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff. The plaintiff accordingly recovered all the costs he had incurred in the first action.

Common interest.

(2) But, on the other hand, where there is a common interest believed on reasonable grounds to exist, assistance in bringing or defending an action is justifiable. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow-commoner defending rights of common, or a landlord defending his tenant in a suit for tithes (*c*).

(3) So, if a number of proprietors of land subscribe to defend an action relating to the land of one in the reasonable belief that they have a common interest in the result, that is not maintenance (*d*).

Interest arising out of charity.

(4) The other exception is where a rich man gives money to a poor man to maintain a suit out of charity. And the motive is none the less charitable within this exception because it is induced by common religious sympathy, as when the Kensit Crusade Committee assisted a poor man in taking proceedings to get a child removed from a home to the religious principles of which the committee objected (*e*). And this exception is applicable notwithstanding that if the person advancing the money had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*f*).

(*c*) *Per* COLERIDGE, C. J., in *Bradlaugh* v. *Newdegate*, 11 Q. B. D., at p. 11.

(*d*) *Findon* v. *Parker*, 11 M. & W. 675. See, too, *British Cash and Parcel Conveyers, Limited* v. *Lamson Store Service Co.*, [1908] 1 K. B. 1006 [C. A.], and *Alabaster* v. *Harness*, [1895] 1 Q. B. 339 [C. A.].

(*e*) *Holden* v. *Thompson*, [1907] 2 K. B. 489.

(*f*) *Harris* v. *Brisco*, 17 Q. B. D. 504 [C. A.].

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Special damage.

(5) In a recent case the plaintiff contemplated laying out land on the south coast as a building estate and offered a prize for a suitable name for the intended resort. He offered also consolation prizes of freehold building plots, subject to the payment by the winners of these of three guineas for the conveyance of their respective plots to them. Defendants in their newspaper alleged the competition was not *bonâ fide*, and that the prizes really were sales of the land at a profit. Defendants offered to take legal proceedings at their own expense on behalf of consolation prize winners to recover the three-guinea fees. Two actions were brought by defendants' solicitors in this behalf and were successful. Plaintiff sued defendants for libel and maintenance. No special damage was shown by the plaintiff. It was held: (1) The success of the maintained action did not deprive plaintiff of his right of action for maintenance: (2) but his failure to prove special damage caused his action to fail (*g*).

(*g*) *Neville* v. *London Express Newspaper, Limited*, [1919] A. C. 368.

CANADIAN NOTES TO CHAPTER III. OF PART II.

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Malice, in the sense of improper motives directed against the plaintiff, is an essential element in the action for maintenance. In *Newswander* v. *Giegerich* (1907), 39 S. C. R. 354, the defendant had assisted one Briggs, an impecunious man, to bring an action, which proved successful, against the plaintiff for recovering a share in a mining claim. The agreement was champertous, and an action which the defendant brought against Briggs upon the agreement was therefore dismissed. In the present case, however, the jury found that Giegerich "did not enter into the litigation for the purpose of stirring up strife and litigation," and that he had not solicited Briggs to undertake it. Upon these findings the Supreme Court, after a careful review of the authorities, held that the plaintiff's appeal must be dismissed.

CHAPTER IV.

OF HARBOURING AND SEDUCTION.

ART. 67.—*Enticing and Harbouring.*

EVERY person is liable to an action for damages who wilfully assaults or entices away another's wife or servant, or knowingly harbours a wife or a servant who has wrongfully quitted his or her master's service (*a*).

The gist of the action for enticing away or harbouring a wife or servant is loss of society of the wife or of the services of the servant. Formerly actions were sometimes brought for beating a wife or servant, whereby the husband or master lost the society or services of his wife or servant. Actions of this sort are now rarely brought.

It seems that in the case of a **servant** (where the action is not brought by a parent or other person *in loco parentis*), the only damages recoverable are the actual pecuniary loss which the plaintiff suffers (*b*).

A master whose servant is injured by the negligence of the defendant may, it seems, sue for damages for loss of service, unless the injuries have caused the immediate death of the servant (*c*).

(*a*) *Winsmore* v. *Greenbank*, Willes, 577 ; *Smith* v. *Kaye*, 20 T.L.R. 261 ; *Blake* v. *Lanyon*, 6 Term Rep. 221.

(*b*) *McKenzie* v. *Hardinge*, 23 T. L. R. 15. In this case the defendant seduced a servant of the plaintiff so that she became pregnant and the plaintiff lost her services ; *Frederick Wilkins & Bros., Limited* v. *Weaver*, [1915] 2 Ch. 322—a case of knowingly harbouring a servant during a breach of contract of service.

(*c*) *Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163 ; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.]. See *ante*, p. 71, note (*t*).

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ART. 68.—*The ordinary Action for Seduction.*

(1) A parent may bring an action for damages against one who seduces his daughter whilst she is in his service, whereby he is deprived of her services.

(2) The plaintiff must prove (a) that the female seduced was at the time of the seduction in his service, actual or constructive (*d*); (b) that he lost her services, either by reason of her pregnancy and confinement, or by reason of her being kept away by the persuasion of the defendant (*e*).

(3) A daughter is constructively in her father's service if she lives at home and performs in fact any slight services (*f*).

(4) A daughter under the age of twenty-one, unmarried and not in other service, is presumed to be in the service of her parents (*g*).

Foundation of action loss of service.

The ordinary action for seduction is founded on the action for assaulting or enticing away a servant. Accordingly, it is always necessary to prove that the female seduced was in the service of the plaintiff, and that in consequence of the seduction the plaintiff lost her services. The substance of the action, however, is not the loss of services, but the injury done to the female seduced and to the honour of her family. She cannot bring an action herself, for she must have given her consent to the connexion, and *volenti non fit injuria*. Hence the action must be brought by someone who has been deprived of her services by the wrongful act of the seducer.

(*d*) *Davies* v. *Williams*, 10 Q. B. 725; *Peters* v. *Jones*, [1914] 2 K. B. 781.

(*e*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283; *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*f*) *Peters* v. *Jones*, *supra*.

(*g*) *Harris* v. *Butler*, 2 M. & W. 539, 542; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

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Accordingly, the plaintiff in an action for seduction must always prove—

(i) **That the female seduced was in his service, actual or constructive, at the time of the seduction.**

(ii) **That by reason of her confinement or otherwise, he was deprived of her services.**

Who can bring action.

The action may be brought not only by a parent, but by anyone *in loco parentis*, such as a person who has adopted the girl as his daughter, or a brother or an aunt with whom the girl makes her home (*h*). It is not necessary that the female seduced should have been under a contract of service with the plaintiff, it is enough that she lived in his house and in fact performed services.

Illustrations. Evidence of service.

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her widowed mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother :—*Held*, that there was no evidence of service at the time of the seduction. And by KELLY, C.B., and MARTIN and BRAMWELL, BB., that the action must fail also on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*i*).

(2) When a girl was seduced whilst living at home with her father and mother, but the father died before her confinement, it was held that the widowed mother could not bring an action against the seducer, as the girl was not in her service at the time of the seduction, but in that of the father (*k*).

(3) In the case of a daughter living at home, such small

(*h*) See note to *Fores* v. *Wilson*, 1 Peake, 55, 56 ; *Murray* v. *Fitzgerald*, [1906] 1 I. R. 254 [C. A.].

(*i*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283 ; cf. *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*k*) *Hamilton* v. *Long*, [1903] 2 I. R. 407 ; affirmed, [1905] 2 I. R. 552 [C. A.].

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services as milking, or even making tea, are sufficient evidence of service (*l*).

(4) Where a girl was in the defendant's service when seduced by him, but was allowed to go home for an afternoon and evening twice a week, and on those occasions assisted in household work and in looking after the other children, it was held that the relationship of master and servant did not exist between the plaintiff and the daughter so as to support an action for seduction (*m*).

(5) And where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*n*); not even when she partly supports her father (*o*).

Daughter under age.

(6) The plaintiff's daughter, *being under age*, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. It was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient constructive service to maintain an action for the seduction (*p*).

(7) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, provided she still continues, in point of fact, one of his own household (*q*).

Action by brother.

(8) When an orphan girl, who lived on a farm with her younger brother and managed the house for him, was seduced, it was held that there was sufficient relation of master and servant to enable him to bring an action and recover general damages against the seducer (*r*).

(*l*) *Bennett* v. *Allcott*, 2 Term Rep. 166; *Carr* v. *Clarke*, 2 Chit. R. 260.

(*m*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722 [C. A.]. See also *Thompson* v. *Ross*, 5 H. & N. 16.

(*n*) *Dean* v. *Peel*, 5 East, 45.

(*o*) *Manley* v. *Field*, 29 L. J. C. P. 79.

(*p*) *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.

(*q*) *Griffiths* v. *Teetgen*, 15 C. B. 344.

(*r*) *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254 [C. A.].

ART. 69.—*Misconduct of Parent.* Art. 69.

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter : it was held, that the plaintiff had brought about his own injury, and had no ground of action (*s*).

ART. 70.— *Damages in ordinary Action for Seduction.*

(1) In cases of seduction, in addition to the actual damage sustained, including any expenses incurred through the daughter's illness, damages may be given for the loss of the society and comfort of the daughter who has been seduced, and for the dishonour, anxiety, and distress which the plaintiff has suffered (*t*).

(2) Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated. On the other hand, the defendant may show, in mitigation of damages, the loose character of the girl seduced.

(3) The right of action is barred after six years (*u*).

(*s*) *Reddie* v. *Scoolt*, 1 Peake, 240.

(*t*) *Bedford* v *McKowl*, 3 Esp. 119 ; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599.

(*u*) 21 Jac. I. c. 16, s. 3.

Art. 70.

(1) Thus, as was observed by Lord ELDON, in *Bedford* v. *McKowl* (*x*), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort will, therefore, rarely be reduced by the court on the ground that they were excessive.

Aggravation of damages.

(2) *A fortiori* will this be the case where the seducer has made his advances under the guise of matrimony. As was said by WILMOT, C.J., in a case of that character: "If the party seduced brings an action for breach of promise of marriage (*y*), so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*z*).

Mitigation of damages.

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*a*). And, generally, the previous loose or immoral character of the girl seduced is ground for mitigation; as, for instance, the using of immodest language or submitting herself to the defendant under circumstances of extreme indelicacy.

(*x*) 3 Esp. 119.

(*y*) The loss caused to the plaintiff by *breach* of a *promise* to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

(*z*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*a*) *Eager* v. *Grimwood*, 16 L. J. Ex. 236; *Verry* v. *Watkins*, 7 C. & P. 308.

CANADIAN NOTES TO CHAPTER IV. OF PART II.

Articles 67-70.

In Canada the law relating to seduction has been somewhat complicated by provincial legislation. The following statutes should be consulted: P. E. I., 1876, c. 4; 1877, c. 6; 1895, c. 5; R. S. Ont. (1914), c. 72; R. S. Man. (1913), c. 177; R. S. Sask. (1909), c. 139; Alta. C. O. (1915), c. 117; N. W. T., 1903 (2), c. 8.

These statutes aim in part at relieving the parent from the necessity of proving service, and in part at giving a right of action to the seduced woman herself. The first of these two objects tends to simplify and rationalise the law by clearing the real cause of action from the encumbrance of an unreasonable fiction. The second object tends to create new difficulties, because it violates the well-known principle of *volenti non fit injuria*. The following cases may be referred to:—

Stoner v. *Skeene* (1918), 44 Ont. L. R. 609; *Collard* v. *Armstrong* (1913), 6 Alta. L. R. 187; *Brown* v. *Nolan* (1917), 1 W. W. R. 1463.

A widow is not an "unmarried female" within the protection of the statutes: *Cambridge* v. *Sutherland* (1914), 8 Alta. L. R. 25.

Under the Quebec law the parent has a right of action against the seducer of his daughter, irrespective of any question of service, and the girl herself has a right of action where the seduction has been accomplished under promise of marriage and followed by pregnancy: see *Mullin* v. *Bogie* (1893), 3 Que. S. C. 34.

In connection with this subject the student should observe that the old action for "criminal conversation," which was abolished in England by the Divorce Act of 1857, still exists in Canada. For modern examples see *Bannister* v. *Thompson* (1914), 32 Ont. L. R. 34; *Zdrahal* v. *Shatney* (1912), 22 Man. L. R. 521; 7 D. L. R. 554. The damages should be compensatory and not punitive: *Herré* v. *Dominique* (1912), 7 D. L. R. 787.

The husband or parent may maintain an action against a defendant who induces his wife or daughter to leave her home, even where there is no evidence of any immoral relationship having taken place: *Van Dorn* v. *Felger* (1918), 14 Alta. L. R. 110; *Walters* v. *Moore*, [1919] 3 W. W. R. 806; 50 D. L. R. 336. For a general discussion of the law on this subject see *Osborne* v. *Clark* (1919), 45 Ont. L. R. 594, 48 D. L. R. 558, where the husband failed in an action against his wife's parents, who took her away with her own consent in the interests of her health.

It has been much disputed on this continent whether the action for criminal conversation is available to the wife since the passing of the various Acts relating to the emancipation of married women. In *Lellis* v. *Lambert* (1897), 24 Ont. App. R. 653, this question is answered in the negative, and the decision has been followed in Ontario. The problem does not seem to have arisen in any other province. In most of the American states the wife is now granted the action, but the jurisprudence is not quite unanimous.

In Quebec the husband has a right of action against the seducer of his wife: *St. Laurent* v. *Hamel* (1892), 1 Que. K. B. 438. In all probability a corresponding right on the part of the wife would not be recognised.

In the United States the principle of the action for seduction has sometimes been applied to other injuries. In 1918 the New York Court of Appeals held that a mother was entitled to recover damages from a defendant who injured her son's health by selling him drugs in contravention of the law: *Tidd* v. *Skinner*, 225 N. Y. 422; 122 N. E. 247; 3 Am. L. R. 1145.

In criminal conversation cases the Statute of Limitations does not begin to run against the plaintiff so long as the adulterous intercourse continues: *King* v. *Bailey* (1901), 31 S. C. R. 338.

CHAPTER V.

TRADE MOLESTATION.

ART. 71.—*Inducing Breach of Contract.*

A PERSON who knowingly and without lawful justification induces another to break a subsisting contract with a third person whereby that third person suffers damage, commits a tort at common law (*a*).

Comment.

This proposition of law was established after a good deal of controversy by the cases cited in the note. It was at one time supposed that though an action lay for inducing a menial servant to break his contract of service, the rule did not apply to other contracts; but by successive stages the rule has been extended to all contracts, such as a contract with an opera singer, or a contract to sell goods (*b*).

The rule is confined to cases where the defendant has induced someone to **break** a contract.

The Trade Disputes Act, 1906

In connection with actions of the kind discussed in this Article, the effect of the Trade Disputes Act, 1906 (*c*), must be considered. That Act, besides enacting that no court shall entertain any action of tort against a trade union (*d*), provides (*e*) that: "*An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment.*"

This section gives no protection to persons who induce breaches of contract by **threats** or **violence,** for then there

(*a*) *Lumley* v. *Gye*, 2 E. & B. 216; *Temperton* v. *Russell*, [1893] 1 Q. B. 715 [C. A.]; *Quinn* v. *Leathem*, [1901] A. C. 510.

(*b*) See the Illustrations.

(*c*) 6 Edw. 7, c. 47.

(*d*) *Ibid.*, s. 4. See *ante*, Art. 21.

(*e*) By *ibid.*, s. 3.

Art. 71. is some other ground of action besides the ground that "it induces some person to break a contract." But it changes the law in this respect, that if the inducement to break a contract be **without threat or violence,** then this is no longer actionable if it is done "in contemplation or furtherance of a trade dispute" (*f*). The fact that trade union officials take part in a dispute does not make it a trade dispute (*g*).

Examples. *Lumley* v. *Gye.*

(1) The plaintiff agreed with a famous singer to perform in an opera. The defendant, a rival manager, offered the singer a large sum of money to break her contract with the plaintiff and sing for him. Assuming that there was *an actual contract of service*, a breach of which the defendant had knowingly brought about, and the plaintiff had thereby suffered damage, there was a good cause of action (*h*).

Temperton v *Russell.*

(2) In order to induce the plaintiff to carry on his trade in a particular manner, agreeably to the wishes of a trade union, the defendants induced B. to break a contract he had with the plaintiff for the supply of building materials. The plaintiff thereby suffered damage and the defendants were held liable (*i*).

Procuring breach of contract by fraud.

(3) The plaintiffs sold their goods wholesale to factors who entered into agreements with them not to sell them to dealers on the plaintiffs' "suspended list." The defendants employed agents to obtain the plaintiffs' goods for them from these factors by falsely representing that they were independent dealers and dealing in fictitious names. By these fraudulent means the defendants induced the factors to break their agreements with the plaintiffs, and

(*f*) *Per* Lord LOREBURN in *Conway* v. *Wade*, [1909] A. C. 506, 511. As to what is a trade dispute, see that case and the definition in the Trades Disputes Act, 1906, s. 5 (3); and see *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Hodges* v. *Webb*, [1920] 2 Ch. 70.

(*g*) *Larkin* v. *Long*, [1915] A. C. 814.

(*h*) *Lumley* v. *Gye*, 2 E. & B. 216, followed and approved in Court of Appeal in *Bowen* v. *Hall*, 6 Q. B. D. 333 [C. A.], and approved by the House of Lords in *Quinn* v. *Leathem*, [1901] A. C. 495.

(*i*) *Temperton* v. *Russell*, [1893] 1 Q. B. 715 [C. A.].

as they had interfered, without justification, with the contractual relations between the plaintiffs and the factors, and the plaintiffs had thereby suffered damage, they had a cause of action against the defendants (*k*). Art. 71.

ART. 72.—*Molestation by Inducements not to Work, not to Employ, and not to Trade with.*

(a) One who intentionally and without sufficient justification, by threats, intimidation, molestation or violence, induces persons not to work for or trade with another whereby that other suffers damage, commits a tort at common law (*l*).

(1) The plaintiffs were endeavouring to trade with natives on the coast of Calabar. The defendant fired a cannon at the natives in order to drive them away and thereby deterred them from trading with the plaintiffs. This was held actionable (*m*). Examples. Molestation.

(2) The plaintiff was a stone-mason. The defendant was held liable for threatening his workmen and customers with mayhem and suits so that they desisted from doing business with the plaintiff (*n*).

(b) Combination to advance self-interest or to injure another's interests by acts which those combining are entitled by law to do individually, is not actionable at the suit of a party whose interests are thereby injured. And combination, even to harm another by the exercise in a lawful manner of a right which is a legal right

(*k*) *National Phonograph Co.* v. *Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335 [C. A.].

(*l*) *Quinn* v. *Leathem*, [1901] A. C. 495; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244.

(*m*) *Tarleton* v. *M'Gawley*, 1 Peake, 205.

(*n*) *Garret* v. *Taylor*, Cro. Jac. 567.

Art. 72. of each person so combining, gives no ground of action to the party injured (*o*).

No illegal act.
No illegal means.
Allen v. *Flood.*

(3) The plaintiffs were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the plaintiffs being employed, on the ground that they had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The defendant, who was a delegate of the union, was sent for by the ironworkers, and informed that they intended to leave off working. *The defendant then warned the employers that, unless the plaintiffs were discharged, all the ironworkers would be called out on strike*, and that wherever the shipwrights were employed the iron men would cease work. The employers accordingly discharged the plaintiffs, *i.e.*, lawfully terminated their engagement and refused to re-engage them. They broke no contract in so doing. The plaintiffs thereupon sued the defendant, and the jury found that he had maliciously induced the employers to "discharge" the plaintiffs, and gave damages. The House of Lords, however, by a majority, dismissed the action, on the ground that the defendant had violated no legal right of the plaintiffs, and done no unlawful act in merely *warning* the employers of the consequences of their continuing to employ the plaintiffs; and that therefore his conduct, however malicious or bad his motive might be, was not actionable (*o*).

Note that no threats, violence or intimidation were used by the defendant. He only warned them of danger which would result from continuing to employ the plaintiffs.

(c) In the presence or absence of combination where illegal means are employed either to advance the lawful trade or other interests of the person or persons employing such means or

(*o*) *Mayor of Bradford* v. *Pickles*, [1895] A. C. 598, 601; *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Allen* v. *Flood*, [1898] A. C. 1; *Davies* v. *Thomas*, [1920] 2 Ch. 189.

to injure the interests of another, the employment of such means gives the injured party a right of action (*p*). Art. 72.

(d) No combination can be a conspiracy unless it is an agreement between two or more persons to do an unlawful act or to effect a lawful purpose by unlawful means (*p*).

(4) In *Quinn* v. *Leathem* the defendants were guilty of an illegal act in that they used threats and coercion of the plaintiff's customers and thereby infringed the liberty of action of these latter (*q*), and similarly in *Pratt* v. *British Medical Association* the defendants were guilty of illegal acts in using coercion of their own members by threat of ostracism of each member (similar to that inflicted on the plaintiffs) who failed to comply with the dictated policy of the Association.

ART. 73.—*Unfair Competition. Passing Off.*

A trader who gets up, describes or marks his goods in such a way as would be calculated to deceive an ordinary purchaser into thinking they are the goods of another, so that he would be likely to secure part of the custom of that other, commits a tort, and is liable in damages or to be restrained by injunction.

Comment.

Actions of this kind must not be confused with actions for infringement of trade-marks, the right to enjoy which is statutory. The wrongs we are now discussing are torts at common law for which an action can be brought for damages (*r*), though the remedy sought is generally an injunction in the Chancery Division.

(*p*) *Quinn* v. *Leathem*, [1901] A. C. 495; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244.

(*q*) *Quinn* v. *Leathem*, [1901] A. C. 495; see judgment of Lord LINDLEY, at p. 539.

(*r*) *Blofield* v. *Payne*, 4 B. & Ad. 410; *Rodgers* v. *Nowill*, 5 C. B. 109; *Reddaway* v. *Banham*, [1896] A. C. 199.

Art. 73.

Passing off goods as those of another.

Where a trader gets up his goods as those of another it is not necessary to prove that he does so fraudulently with intent to deceive, or that anyone is in fact deceived (*s*). "All that it is necessary to prove is that the defendants' goods are so marked, made up, or described by them as to be calculated to deceive ordinary purchasers, and to lead them to mistake the defendants' goods for the goods of the plaintiffs," even though the description is true as to the nature of the goods or their locality of manufacture (*t*), for "no man can have any right to represent his goods as the goods of another person" (*u*).

Description.

When a person assumes a name which does not belong to him he will be restrained from doing so if the result would be calculated to deceive (*x*).

Use of one's own name.

Generally speaking, a man may use his own name, even though his goods may in consequence be mistaken for those of another (*y*). When a person assumes a name which does not belong to him, he will be restrained from doing this, if his so doing would be calculated to deceive (*x*). And a man may even be restrained from using his own name, if it is clearly proved that he is using it with the **fraudulent intent** of attracting the custom of a rival, but not otherwise. For *primâ facie* a man has a right to use his own name (*z*).

Illustrations.

Get up-of goods.

(1) Actions have been brought successfully by an inventor of metallic hones against another trader who wrapped his in envelopes resembling the plaintiff's (*a*);

(*s*) *Warwick* v. *New Motor Co., Ltd.*, [1910] 1 Ch. 248; *Ewing* v. *Buttercup Margarine Co.*, [1917] 2 Ch. 1; *Pullman* v. *Pullman* (1919), 36 R. P. C. 240.

(*t*) *Per* LINDLEY, L.J., in *Reddaway* v. *Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639 [C. A.], at p. 644; "*Singer*" *Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376; *Montgomery* v. *Thompson*, [1891] A. C. 217; *Edge* v. *Niccolls*, [1911] A. C. 693.

(*u*) *Per* HALSBURY, L.C., in *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710, at p. 711, quoting from TURNER, L.J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

(*x*) *F. Pinet et Cie* v. *Maison Louis Pinet, Limited*, [1898] 1 Ch. 179.

(*y*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.].

(*z*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

(*a*) *Blofield* v. *Payne*, 4 B. & Ad. 410.

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by makers of camel-hair belting against defendants who made similar belting, which they described quite truly but using the name used by the plaintiffs, *i.e.*, camel-hair belting. It was held that the term "camel-hair belting" had come to indicate to the public the plaintiffs' article, and therefore such use by defendants in fact deceived the public, and an injunction to cease such description was granted against the defendants (*b*); and by brewers at Stone of a drink known as "Stone Ale," against another firm of brewers who also manufactured ale at Stone and sold it as "Stone Ale" (*c*).

Similarity of name.

(2) Though the plaintiffs had for many years carried on business as steel manufacturers under the style of Thomas Turton & Sons, it was held they could not prevent a firm consisting of John Turton and his two sons from carrying on a similar business under the name of John Turton & Sons, that being a true description of the firm, and there being no evidence of any attempt to deceive the public (*d*); but where a person assumed as his name the name of a manufacturer of boots and shoes with the object of making boots and shoes and passing them off as those of the old-established firm, he was restrained from using the name in connection with the sale of boots and shoes (*e*).

(*b*) *Reddaway* v. *Banham*, [1896] A. C. 199. Note the effect of the Trade Marks Act, 1919, s. 6.

(*c*) *Montgomery* v. *Thompson*, [1891] A. C. 217.

(*d*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.].

(*e*) *F. Pinet et Cie* v. *Maison Louis Pinet, Limited*, [1898] 1 Ch. 179; and see the still stronger case where the plaintiff had no place of business here yet was granted an injunction (*Poiret* v. *Poiret (Jules), Limited, & Nash* (1920), 37 R. P. C. 177).

CANADIAN NOTES TO CHAPTER V. OF PART II.

Articles 71 and 72.

The Canadian cases upon trade union activities raise the same kind of difficult problems as have arisen in England. It should, however, be observed that the provisions of the English Trades Disputes Act of 1906 have not been adopted by any Canadian province, and that the question therefore still remains open for the application of purely legal principles.

Since the publication of the text the English Court of Appeal has decided the case of *Ware & de Fréville* v. *British Motor Trade Association* (1921), 3 K. B. 40, in which the learned judges have frankly expressed the difficulty which most students have felt in reconciling the various English decisions. The wrong complained of was a scheme by which the defendants organized a commercial boycott of any dealers who sold certain makes of cars at prices different from those sanctioned by the Association. The Court of Appeal held that this gave no right of action to the plaintiffs, who had been boycotted in accordance with the rules.

The right of action in cases where the defendant induces a breach of contract is now well established. In all other cases I would submit that no cause of action is disclosed where A., B., and C. agree to do acts which, if done independently, would be within the legal rights of each one. For example, they cannot be made liable for refusing to deal with X., or for persuading others not to deal with X., or for socially ostracising X. If, however, they cannot effect their common object without libelling X., or without committing some of the acts prohibited by section 501 of the Criminal Code, then they are guilty of a tort. This would appear to be the principle of the decision in *Ware's Case*, a pronouncement which should be of valuable assistance in clearing up this confused and difficult branch of the law. The difficulty in these cases has been created by the attempt of the courts to give an unwarrantably extended meaning to the word "coercion." If the law were to be

gathered entirely from the decisions cited in note (*o*) on p. 152, it would be clear and intelligible. Unfortunately some judges have been tempted to strain the meaning of "coercion" in order to hold that it is an actionable wrong for men to threaten to do things which they are legally at liberty to do.

The Canadian cases are not entirely consistent, but for the most part appear to be in accord with the principle suggested above. In *Cotter* v. *Osborne* (1909), 18 Man. L. R. 471, the defendants were guilty of acts prohibited by section 501 of the Criminal Code. In *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers* (1903), 5 Ont. L. R. 463, they had induced workmen to break their contracts. In *José* v. *Metallic Roofing Co.* (1908), A. C. 514, the Privy Council corrected the Ontario Court of Appeal (14 Ont. L. R. 156), and held that the union could not be made liable for passing a strike resolution, though it resulted in a strike, unless they had in addition been guilty of some unlawful act. See also *Graham* v. *Knott* (1908), 11 B. C. R. 97.

On the other hand, in *Williams* v. *Local Union No. 1562 of U. M. W. A.* (1919), 14 Alta. L. R. 251, a decision was rendered in favour of plaintiffs, who had been dismissed from their employment under threat of a strike. The Court of Appeal was equally divided upon the question, and there is strong reason for holding with the dissentient judges that the case was governed by the principle of *Allen* v. *Flood*. An appeal to the Supreme Court was dismissed (59 S. C. R. 240), so far as the individual defendants were concerned, Duff, J., dissenting. The whole case is a striking example of the confused state of judicial opinion upon this problem, a confusion which *Ware's Case* may do much to remedy.

In *Heinrichs* v. *Wiens* (1917), 1 W. W. R. 306; 31 D. L. R. 94, the plaintiff, a member of a Mennonite congregation, had been boycotted and injured commercially in consequence of an excommunication pronounced against him by the local bishop. The boycott was in accordance with the rules of the sect, but the bishop's decision had been given owing to the plaintiff's refusal to settle a money claim, which the civil courts subsequently found to be unjustified. Upon these facts it was held that he had a right of action against the bishop and other church officers. The decision can be supported on the ground that the

plaintiff had been wrongfully expelled from membership, and was entitled to recover damages for the injury thereby sustained, but it should not be read as an authority for holding that the agreement of the congregation to have no dealings with an excommunicated member gave him any cause of action.

The principle of *Allen* v. *Flood* was applied by the Supreme Court in the Quebec case of *Perrault* v. *Gauthier* (1898), 28 S. C. R. 241, where the plaintiff had been driven out of his employment by a strike. Taschereau and Gironard, JJ., made it clear that the doctrine *qui jure suo utitur neminem laedit* applies equally in civil and in common law.

ARTICLE 13.

Apart from the violation of statutory rights, the essence of the wrong in these cases consists in the diversion of the plaintiff's trade by words or signs likely to deceive the public.

In *Pabst Brewing Co.* v. *Ekers* (1902), 21 Que. S. C. 545, the defendants had for many years sold beer, admittedly brewed in Montreal, as "Milwaukee Lager." At a later date the plaintiffs, who were a Milwaukee firm, began to sell beer in Canada, and sought an injunction to restrain the defendants from continuing to use the name of Milwaukee on their bottles. The evidence shewed that the defendants had never concealed the fact that their beer was brewed in Montreal, and the action was dismissed.

In *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (1902), 32 S. C. R. 315, the dispute turned upon the use of the word "Bostons" as descriptive of certain goods. Although there could be no property in such a word, the facts shewed a clear attempt on the part of the defendants to pass off their goods as being those of the plaintiff company, and an injunction was granted.

So again in "*My Valet*," *Ltd.* v. *Winters* (1913), 29 Ont. L. R. 1; 13 D. L. R. 583, the defendant was restrained from describing his clothes pressing establishment as "My New Valet," since his action was an obvious attempt to secure part of the plaintiff's custom by the use of that name.

CHAPTER VI.

OF DECEIT OR FRAUD.

ART. 74.—*Definition of Fraud.*

FRAUD consists of a false representation made with intent to deceive and to be acted upon, and either known by the party making it to be false, or made without belief in its truth, or recklessly without caring whether it be true or false.

The general rule of law is, that mere silence with regard to a material fact will not give a right of action for fraud, and no action can be maintained on deceit which does not in fact deceive (*a*).

Essentials of actionable deceit.

The essentials of actionable deceit are : (1) A false statement of fact ; (2) made recklessly or with knowledge of its falsity ; (3) with intent plaintiff shall act on it (*b*) ; (4) that plaintiff has so acted (*c*) ; (5) that plaintiff thereby suffered damage.

When silence amounts to fraud.

Though it is generally true to say that there must be active fraud, nevertheless there may be statements of a fragmentary character, true as far as they go, but so distorted as to convey a wholly erroneous impression ; and statements of that kind made with intent to deceive may amount to fraudulent statements although literally true. "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor,

(*a*) *Horsfall* v. *Thomas* (1862), 1 H. & C. 90.

(*b*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377 ; *Tackey* v. *McBain*, [1912] A. C. 186.

(*c*) *Smith* v. *Chadwick*, L. R. 9 App. Cas. 187.

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you set out two passages in his report and leave out a third passage which qualifies them, that is an actual misstatement" (*d*).

Actual fraud necessary.

The leading case of *Derry* v. *Peek* (*e*) establishes that, in an action of deceit, the plaintiff must prove actual fraud; he may prove it by showing that the false representation was made knowingly, or without belief in its truth, or recklessly, not caring whether it was true or false. But an untrue statement made through carelessness, and **without reasonable ground for believing it to be true, does not amount to fraud**; and if the jury finds that it was made in the *honest belief* that it was true, the defendant will not be liable in an action of deceit, however unreasonable his belief may have been. **No amount of negligence can amount to fraud** (*e*).

(1) The false statement must be of a fact (*f*) not a mere promise; but a statement of opinion if wilfully false is actionable as a tort (*g*).

(2) It must be made recklessly, that is without an honest belief in the truth of the statement (*h*), but not merely negligently (*i*).

(3) The right of action is confined to the person intended to act on the statement (who need not be the person to whom the statement is made (*f*)), others must act at their own risk. But purchasers of shares relying on a prospectus have a good cause of action (*j*).

(4) It is essential that the plaintiff be influenced by the untrue statement (*k*) and that he acted as a result

(*d*) *Per* JAMES, L.J., in *Arkwright* v. *Newbold*, 17 Ch. D. 301, at p. 318; *Peek* v. *Gurney*, L. R. 6 H. L., at p. 403.

(*e*) 14 App. Cas. 337; and see *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 [C. A.]; *Weir* v. *Bell*, 3 Ex. D. 238.

(*f*) *Langridge* v. *Levy*, 2 M. & W. 519.

(*g*) *Anderson* v. *Pacific Insurance Co.* (1872), L. R. 7 C. P. 69.

(*h*) *Derry* v. *Peek*, *supra*.

(*i*) *Le Lievre* v. *Gould*, *supra*; *Glasier* v. *Rolls*, 62 L. T. 133 [C. A.].

(*j*) *Andrews* v. *Mockford*, [1896] 1 Q. B. 372; *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34.

(*k*) *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 485.

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of it (*l*). But no action lies if the plaintiff is not in fact deceived (*m*), though the fact that the plaintiff has been negligent in so acting on the untrue statement is no defence (*n*).

(5) The cause of action is not the deceit but the detriment suffered by the plaintiff, hence damage must be proved (*o*).

No intent to benefit.

(6) The false statement need not be made with intent to benefit the defendant. It is sufficient that it was made with intent to deceive, and was followed by loss which a reasonable man might have contemplated. Thus, where a foolish practical joker told the plaintiff that her husband had had both his legs smashed in a railway accident, and that she was to go to him at some distance immediately with appliances for bringing him home, he was held liable for the nervous shock and subsequent ill-health of the plaintiff (*p*).

(7) Where a gunmaker sold a gun to B., for the use of C., fraudulently representing it to be sound, and the gun burst while C. was using it, and he was thereby injured :— *Held*, that C. might maintain an action of fraud against the gun-maker, as the statement with regard to the soundness of the gun, though made to B., was intended to be acted upon, and was acted upon by C. (*q*).

Fraud of agent.

Cornfoot v. *Fowke*.

(8) A principal is generally liable for the fraud of his agent or servant acting within the scope of, and in the course of, his employment (*r*), and in *Cornfoot* v. *Fowke* (*s*) the question arose whether a principal is liable for the act of his agent who makes, on behalf of his principal but without his authority, a false statement which he believes to be true, but which the principal would have known to be untrue. A house agent represented to an intending lessee

(*l*) *Macleay* v. *Tait*, [1906] A. C. 24.
(*m*) *Horsfall* v. *Thomas* (1862), 1 H. & C. 90.
(*n*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 ; *Wells* v. *Smith*, [1914] 3 K. B. 722.
(*o*) *Dobell* v. *Stevens*, 3 B. & C. 623.
(*p*) *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.
(*q*) *Langridge* v. *Levy*, *supra*.
(*r*) See Art. 27, *ante*.
(*s*) 6 M. & W. 358.

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that there was no objection to a house. There was, in fact, a brothel next door. The principal knew of this; the agent did not:—*Held*, the principal was not liable in an action of fraud. The agent was not fraudulent, because he did not know that the statement was untrue, and the principal had not himself committed a fraud, because he did not make the statement or authorise the agent to make it. How, then, could the principal be liable for a fraud which neither he himself nor his agent had committed?

Where, however, a principal intentionally keeps an agent ignorant of a fact, intending that he shall misrepresent it, and the agent does so, the principal is liable for fraud. His conduct in that case is as fraudulent as if he had himself made the misrepresentation with knowledge of its falsity (*t*).

ART. 75.—*Statements as to Credit.*

Where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another, with intent to procure for him credit, money or goods, no action will lie unless the representation is in writing signed by the defendant (*u*), consequently an incorporated bank is not liable for a fraudulent misrepresentation made by a manager (*v*).

ART. 76.—*The Liability of Directors and Promoters of Companies.*

Directors and promoters of companies who are parties to the issuing of any prospectus inviting

(*t*) *Ludgater* v. *Love*, 44 L. T. 694 [C. A.].

(*u*) 9 Geo. 4, c. 14, s. 6. It will be observed that the signature must be that of the defendant himself, and not of an agent or partner (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 [Ex. Ch.]; *Williams* v. *Mason*, 28 L. T. 232).

(*v*) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560.

subscriptions to the shares, debentures or debenture stock of a company, are liable to persons who subscribe on the faith of such prospectus for untrue statements therein made **without reasonable ground** (*w*). Art. 76.

Comment. The decision in *Derry* v. *Peek* (*x*), that if a person issuing a prospectus had an honest belief in its truth he could not be made liable in an action for deceit, however careless he may have been, and however slender the grounds of his belief, led to an amendment of the law by which Parliament created a statutory liability to pay compensation for untrue statements in prospectuses, **without proof of actual fraud,** unless the defendant has reasonable grounds for believing the statement to be true, or can establish one of the other defences allowed by the Act (*w*). It is now enacted that where a prospectus invites persons to subscribe for shares in, or debentures or debenture stock of, a company, every director and promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to persons who subscribe for any shares, debentures, or debenture stock, on the faith of such prospectus, for loss sustained by *any untrue statement* in the same, *unless it is proved either*—

(a) that the defendant had *reasonable ground to believe*, and did believe, that it was true ; or
(b) that the statement fairly represented some statement in the report of an expert (whom the defendant believed to be competent), or in a public or official document ; or
(c) that the prospectus was issued without the authority or consent of the defendant, and that he took the proper steps indicated in the Act to make this known (*w*).

It will be perceived that this statute really creates a new statutory duty, the breach of which is a tort, but that it

(*w*) Section 84 of the Companies (Consolidation) Act, 1908, being a re-enactment of the Directors' Liability Act, 1890.
(*x*) 14 App. Cas. 337.

Art. 76. makes no alteration in the common-law action for deceit. In short, it makes directors and promoters liable for carelessness as well as for fraud (*y*). But the liability is none the less based in tort, and so the right dies with the possessor (*z*).

(*y*) See *Dovey* v. *Cory*, [1901] A. C. 477 ; *Prefontaine* v. *Grenier*, [1907] A. C. 101 [P. C.].

(*z*) *Geipel* v. *Peach*, [1917] 2 Ch. 108.

CANADIAN NOTES TO CHAPTER VI. OF PART II.

Articles 74-75.

Deceit and fraud play a larger part in the law of contract than in tort. The delictual problems which have given rise to most difficulty have now been dealt with by statute: see Article 76.

In the case of *Gillis Supply Co.* v. *Chicago, Milwaukee, and Puget Sound Ry. Co.* (1911), 16 B. C. R. 254, the agent of the defendant company gave the plaintiffs erroneous information as to freight rates, thereby causing them to enter into an unprofitable transaction. As the information was given in good faith, although carelessly, the court held that the defendants were not liable.

Petrie v. *Guelph Lumber Co.* (1886), 11 S. C. R. 450, was an action against directors for mis-statements in a company's prospectus. The Supreme Court found that the statements in question were honestly made, and dismissed the action on the same view of the law that was later adopted in the leading English case of *Derry* v. *Peek*.

Article 76.

In Canada the Dominion and the provinces have concurrent powers of incorporating companies, and there is therefore a large volume of legislation upon this subject. In the Dominion Act and in Nova Scotia, Ontario, Saskatchewan, Alberta and British Columbia, the liability of directors is defined by provisions closely resembling those of the English Act, but with variations in wording which should be carefully noticed. The Companies Acts of New Brunswick, Prince Edward Island, Quebec, and Manitoba contain no special provisions defining the liability of directors for statements made in the prospectus.

CHAPTER VII.

OF NEGLIGENCE.

ART. 77.—*Definition.*

(1) Negligence consists in the omission to do something which a prudent and reasonable man would do, or the doing something which a prudent and reasonable man would not do (*a*).

(2) Negligence is actionable whenever, as between the plaintiff and the defendant, there is a duty cast upon the latter not to be negligent, and a breach of this duty which causes damage to the plaintiff (*b*).

It will be seen that there are three points to be established to found an action for negligence:

(i) A duty to take care, owed by the defendant to the plaintiff. Duty to take care.

(ii) A breach of that duty—negligence.

(iii) Damage as the natural and probable consequence.

The duty to take care arises out of many relations equally impossible of strict definition or of enumeration in a short compass.

Some of the typical cases are dealt with in the following articles, but the list is not exhaustive. It must not be forgotten, however, that though there is a vast variety of circumstances in which there is a duty to take care, *where there is no duty there can be no action for negligence.*

The student should refer back to Part I., Chapter III., where some of the cases in which it has been held that

(*a*) *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784.

(*b*) See *per* Lord HERSCHELL, *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216, at p. 225.

Art. 77. there is no duty to take care are considered (*c*). Other cases will be found in the following Articles.

What is negligence.

It will be observed that negligence may consist in either misfeasance, *i.e.*, doing that which a prudent and reasonable man would not do; or in nonfeasance, *i.e.*, omitting to do something which a prudent and reasonable man would do. Negligence is judged by the standard of prudence of an ordinary reasonable man, and if a person omits some precaution which a person of ordinary intelligence and prudence would take, he is negligent, although he may himself honestly think it unnecessary to take such a precaution. So a person may be negligent in taking care of another's money entrusted to him for that purpose—though he takes as much care of it as he takes of his own (*d*).

Degree of care required depends on circumstances.

It must be remembered that the degree of care which a person is bound to use in regard to others is relative, and that in deciding whether a given act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

Want of skill.

A person who undertakes something requiring special knowledge or skill is negligent if by reason of his not possessing that knowledge or skill he bungles, although he does his best (*e*).

So a person who drives a horse or a motor car is negligent if he does something which a prudent person having

(*c*) See especially *Winterbottom* v. *Wright*, 10 M. & W. 109; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; and *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 [C. A.], *ante*, Art. 17; and *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216; *Butler* v. *Fife Coal Co.*, [1912] A. C. 159.

(*d*) *Doorman* v. *Jenkins*, 2 A. & E. 256; *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387 [C. A.].

(*e*) *Heaven* v. *Pender* (1883), 11 Q. B. D. 507.

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reasonable skill as a driver would not do; and a person practising surgery without the ordinary skill and knowledge of a surgeon, is negligent if he blunders by reason of his want of knowledge and skill (*f*).

But no person is required to have extraordinary foresight, prudence or skill, and so long as one uses ordinary skill and acts with reasonable prudence, he cannot be said to be negligent (*g*).

So in the case of a solicitor, erroneous judgment upon a new point of law or upon a difficult question of construction is not negligence, but ignorance of practice and mismanagement of the preparation of a case for trial is, for these are matters in which a solicitor of ordinary intelligence, and having that knowledge of his professional duties which all solicitors should have, ought not to make a mistake (*h*).

ART. 78.—*Duty of Persons using Highway to take Care.*

Every person using a highway or other place frequented by the public owes a duty to take care as regards the persons and property of others. So if a person driving or riding on a highway *by his negligence* runs over, or otherwise damages, another person on the highway an action will lie for the damage suffered. So, also, persons in charge of ships at sea or on rivers are bound to use care not to do damage to the persons or property of others (*i*).

(*f*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 733.

(*g*) *Hammack* v. *White* (1862), 11 C. B. [N.S.] 588; *Manzoni* v. *Douglas* (1880), 6 Q. B. D., LINDLEY, J., at p. 153.

(*h*) See *Godefroy* v. *Dalton*, 6 Bing. 460, 468.

(*i*) See the rule stated more broadly by Lord BLACKBURN in *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1206; and by Lord ESHER more broadly still in *Heaven* v. *Pender*, 11 Q. B. D. 503 [C. A.]. In the latter case COTTON and BOWEN, L.JJ., dissented from Lord ESHER'S proposition, and Lord ESHER himself explained it in *Le Lievre* v. *Gould*, [1893] 1 Q. B 491, 497 [C. A.].

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NOTE.—This rule does not depend on the special nature of highways. It applies generally to all places where persons are likely to meet others. As Lord BLACKBURN says: "Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision" (*j*). So the rule applies equally to persons on railway stations, in shops, or any other places where people congregate.

ART. 79.—*Duty of Carriers of Passengers.*

Carriers of passengers by any sort of carriage or conveyance owe to passengers a duty to take reasonable care to carry them safely. This duty arises not from contract but from the fact that the passenger is being carried with the knowledge and consent of the carrier; and it applies whether the carriage is gratuitous or for reward (*k*), but not if the passenger is a mere trespasser (*l*).

NOTE.—This rule is the foundation of the liability of railway companies to their passengers. That the duty is one arising quite **independently of any contract** between the carrier and the passenger is laid down in *Kelly* v. *Metropolitan Rail. Co.* (*m*), and is well shown by the following illustrations. It must be noted that a carrier of passengers (unlike a common carrier of goods) does **not warrant** the safety of the passenger. He is only liable for negligence, and if an injury happens to the passenger **without negligence there is no liability** (*n*).

(*j*) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1206.

(*k*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219.

(*l*) *Grand Trunk Rail. Co.* v. *Barnett*, [1911] A. C. 361 [P. C.]; *Lygo* v. *Newbold*, 9 Ex. 302.

(*m*) [1895] 1 Q. B. 944 [C. A.], explaining *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.].

(*n*) *Readhead* v. *Midland Rail. Co.*, L. R. 4 Q. B. 379 [Ex. Ch.]: *Newberry* v. *Bristol Tramways Co.* (1912), 107 L. T. 801.

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Illustrations.

(1) An infant over three years of age whilst travelling by railway with its mother (with the knowledge and implied consent of the company's servants, but without a ticket) was injured by the negligence of the railway company. The company were held liable though there was no contract to carry the infant (*o*).

(2) But where a person was injured whilst travelling on the footboard of a train in defiance of a byelaw and without the permission of the company, so that he was a mere trespasser, it was held that the company owed him no duty and he had no cause of action (*p*). But distinguish this from the position of a licensee for whose safety failure to take reasonable care will entail liability for negligence (*q*).

(3) A passenger in a railway train was injured in an accident caused by the breaking of the tyre of a wheel of the carriage in which he rode. The defendants had used all diligence in providing a safe carriage and examining it before starting and in the course of the journey. There being no negligence the company were not liable (*r*).

See also *Harris* v. *Perry & Co.* (*s*), cited *ante*, p. 37, Art. 18.

ART. 80.—*Duty of Occupiers of Land and Houses to Persons coming by Invitation, etc.*

(1) An occupier of land, buildings or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know (*t*).

(2) An occupier of land or buildings owes to

(*o*) *Austin* v. *Great Western Rail. Co.*, L. R. 2 Q. B. 442.
(*p*) *Grand Trunk Rail. Co.* v. *Barnett*, [1911] A. C. 361 [P. C.].
(*q*) *Tough* v. *North British Rail. Co.*, [1914] S. C. 291.
(*r*) *Readhead* v. *Midland Rail Co.*, L. R. 4 Q. B. 379.
(*s*) [1903] 2 K. B. 219 [C. A.].
(*t*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274; affirmed L. R. 2 C. P. 311 [Ex. Ch.]; *Elliott* v. *Roberts, Limited*, [1916] 2 K. B. 518 [C. A.].

Art. 80. bare licensees and guests a duty not to set a trap, *i.e.*, not to put there any unexpected danger of which he actually knows without warning the licensee or guest (*u*).

Persons coming by invitation.

The duty owed to persons coming in the course of business by invitation applies to all persons who go on business which concerns the occupier, or in which he is even indirectly interested. There need not be an express invitation. An invitation is implied when the persons come in the ordinary course of business. It will be noticed that the rule of liability does not throw on the occupier an absolute duty to insure the safety of the premises. So he is not liable for some latent defect in a structure which he did not know of and could not have provided against by taking reasonable care. It is only a duty to **use reasonable care to prevent damage from unusual danger,** *i.e.*, from dangers which would not usually be found on premises of the kind. Persons cannot complain of dangers which they would expect to find on premises of the kind.

Duty as between landlord and tenant.

As between landlord and tenant the duty to repair the demised premises depends entirely on the contract between the parties, and apart from contract the landlord owes the tenant no duty to repair or not to let the premises in a dangerous condition. Hence, if a landlord lets a house in a dangerous condition, he is not liable to the tenant or to a person using the premises by invitation of the tenant for any injuries happening during the term owing to the defective state of the house (*v*).

(*u*) See *Indermaur* v. *Dames*, *supra*, and *Gautret* v. *Egerton*, L. R. 2 C. P. 371; *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K. B. 439 [C. A.].

(*v*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.]. As to the implied warranty in the case of a letting of a *furnished* house, see *Smith* v. *Marrable*, 11 M. & W. 5; and *Wilson* v. *Finch Hatton*, 2 Ex. D. 336; and see *Sarson* v. *Roberts*, [1895] 2 Q. B. 395 [C. A.].

And as to the statutory obligation to repair in the case of small houses within the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15, it has been decided that this obligation is in favour of the tenant only, and not available to give a right of action to his wife (*Middleton* v. *Hall* (1913) 108 L. T. 804) or his daughter (*Ryall* v. *Kidwell & Son*, [1914] 3 K. B. 135) to recover for damage due to non-fulfilment of the obligation. But as to the tenant himself it is no answer that the danger was obvious (*Dunster* v. *Hollis*, [1918] 2 K. B. 795).

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Accordingly when a landlord contracted with his tenant to repair a defective house, but failed to do so, and the wife of the tenant was injured by reason of the defective state of the house, it was held that she had no cause of action, as she was a stranger to the contract (*x*), and the defect being obvious there was no trap for which the landlord could be made liable in tort (*y*).

So, too, when an owner of a building let out in flats or separate tenements keeps possession of the common staircase, he owes to his tenants (apart from contract) with regard to lighting and repairing the staircase, and the guests of his tenants or persons coming on business with them, no duty other than that owed to bare licensees, *i.e.*, to warn of any unusual or concealed danger of which the owner is aware. Accordingly, if such a person is injured in consequence of the dangerous condition of the staircase he has no cause of action against the landlord (*z*) unless (1) the landlord has taken upon himself, by contract with the tenant, the obligation of repairing, in which event, as he must contemplate that the staircase will be used by persons having business with the tenants, he owes them a duty to keep it in a reasonably safe condition (*a*), or (2) the defect is concealed and constitutes a trap.

Licensees and guests.

Bare licensees, *i.e.*, persons who come not for any business in which the occupier is interested, but merely by permission for their own purposes, and guests, are in a somewhat different position. Their position is analogous to that of a person who receives a gift. He is only entitled to use the place as he finds it, and cannot complain, unless there is some design to injure him, or the occupier has done some

(*x*) *Cavalier* v. *Pope*, [1906] A. C. 428.

(*y*) *Lucy* v. *Bawden*, [1914] 2 K. B. 318; *Norman* v. *Great Western Rail. Co.*, [1915] 1 K. B. 584 [C. A.]; *Dobson* v. *Horsley*, [1915] 1 K. B. 634 [C. A.].

(*z*) *Huggett* v. *Miers*, [1908] 2 K. B. 278 [C. A.]; and compare *Ivay* v. *Hedges*, 9 Q. B. D. 80. It is difficult to reconcile *Hargroves, Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472, with these cases.

(*a*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177 [C. A.]—a case which can be supported on the special facts. Judgment of ATKIN, J., at p. 321. It seems now established that, apart from contract, the landlord's liability is to warn of concealed dangers of which he actually knows; see (*y*) above.

Art. 80. wrongful act, such as digging a trench on the land or misrepresenting its condition, or anything equivalent to laying a trap for the unwary. A giver of a gift is not responsible for the insecurity of the gift unless he knows its evil character at the time and omits to caution the donee. So, too, in the case of a person to whom permission to go on land is given, he cannot complain unless there is something like fraud in the gift (*b*). But where the licence is limited in area the licensor is under no liability to warn a licensee who trespasses on to other ground (*c*).

Trespassers.

Trespassers are in a worse position than bare licensees, for, as no permission is given, there can be no duty to give warning of danger. And he cannot maintain an action where his unlawful act or conduct is connected with the harm he suffers as part of the same transaction. *e.g.*, falling into a hole in the land trespassed on. But even a trespasser has a right of action if he is injured, whilst trespassing, by some wrongful act of the occupier, as, for instance, if he is assaulted, or is injured by something which the occupier of the land has put there for the purpose of injuring him (*d*), *e.g.*, spring guns, and other infractions of statutes as to fencing, barbed wire, and highways, or with a knowledge he is there (*e*).

The judgment of WILLES, J., in the two leading cases of *Indermaur* v. *Dames* and *Gautret* v. *Egerton*, should be carefully studied.

Illustrations.

Persons coming by invitation.

(1) Upon the defendant's premises was a trap-door on the level of the floor used for raising and lowering bags of sugar from one floor to another. It was not necessary that it should be unfenced when not in use. The plaintiff, a journeyman gasfitter employed by persons who had fixed a gas regulator upon the defendant's premises, came to test the apparatus. Whilst so engaged he fell through the trap-door and was injured. The trap-door at the time was not

(*b*) See the judgment of WILLES, J., in *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

(*c*) *Jenkins* v. *Great Western Rail. Co.*, [1912] 1 K. B. 525.

(*d*) *Bird* v. *Holbrook*, 4 Bing. 628.

(*e*) *Petrie* v. *Rostrevor Owners*, [1898] 2 Ir. R. 556.

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in use and was not fenced. There was no negligence on his part :—*Held*, that he was on the premises on business in which the defendant was interested, and that the defendant was liable as the danger was an unusual danger, and the defendant had neglected his duty to take reasonable care by fencing it or warning the plaintiff (*f*).

(2) The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendants was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger :—*Held*, that the defendants were liable (*g*).

(3) The defendant engaged a contractor to erect a grand stand for viewing races. The plaintiff paid for a seat on the grand stand. Owing to the negligence of the contractor the stand was defective, and it fell and the plaintiff was injured. The defendant was liable, although neither he nor his servants were personally negligent. It was their duty to see that the stand was reasonably safe (*h*).

(4) Workmen were allowed to cross a piece of vacant land to get to some docks. On this land were canals and bridges. One of the bridges was out of repair, and a workman when crossing by it fell into a canal and was drowned. In an action brought by his widow it was held that as the workman was a bare licensee he must take the place as he found it, and as there was no trap the defendant was not liable (*i*).

But where children were bare licensees and in playing on defendant's land one was injured by one of a heap of stones there falling on her hand, it was held that there being no concealed danger there was no duty to warn and consequently no liability (*k*). And where children were

(*f*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274 ; affirmed L. R. 2 C. P. 311 [Ex. Ch.].

(*g*) *White* v. *France*, 2 C. P. D. 308.

(*h*) *Francis* v. *Cockrell*, L. R. 5 Q. B. 184.

(*i*) *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

(*k*) *Latham* v. *Johnson & Nephew, Limited*, [1913] 1 K. B. 398.

Art. 80. repeatedly warned and sent away by the servants of a railway company to prevent them coming on the company's premises and playing with a moving staircase, it was held that their return after such warnings constituted them trespassers with no right of action for resultant injury (*l*).

(5) In *Lowery* v. *Walker* (*m*) the defendant was a farmer who put in a field a horse which he knew to be savage. The defendant had tacit permission to cross the field, and whilst doing so was bitten by the horse, and as no warning was given of the concealed danger to the tacit licensee the defendant was held liable.

Trespassers. (6) If a person sets a spring gun on his land with the intention that it shall go off and cause injury to trespassers, he is liable for the intentional wrong so done. What he does really amounts to an assault (*n*). If he leaves dangerous things like guns about he must take proper precautions to prevent their doing damage (*o*), and *a fortiori* he is liable if he contrives that they shall do damage.

ART. 81.—*Duty of Bailees of Goods.*

Bailees of all kinds, including carriers, owe to their bailors a duty to take care of the goods and chattels bailed. The degree of care required varies with the nature of the bailment (*p*).

NOTE.—All kinds of bailees of goods and chattels are bound at least to take reasonable care of the goods bailed to them, though, generally speaking, greater care is expected of one who derives benefit from the bailment, such as a borrower of goods, or a pawnbroker or hirer, or a warehouseman who is paid for keeping them, than from one who has the custody of goods for the benefit of the bailor

(*l*) *Hardy* v. *Central London Rail. Co.* (1920), 36 T. L. R. 843.
(*m*) [1911] A. C. 10.
(*n*) *Bird* v. *Holbrook*, 4 Bing. 628.
(*o*) See *Dixon* v. *Bell*, 5 M. & S. 198.
(*p*) See *Coggs* v. *Bernard*, 1 Sm. L. C. 173.

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only, such as one who gratuitously undertakes their custody for the convenience of the owner (*q*).

The topic of the liability of carriers and other bailees for the safety of goods entrusted to them is too large to be dealt with fully in this work, and it is only necessary here to refer the student to the cases cited in a previous Article, which show that the liability is one in tort, arising by reason of the bailment and quite apart from contract (*r*). It must be remembered, however, that the liability of a bailee may be modified by contract between the parties, and where goods are carried under an express contract the common-law liability of the bailee may be thereby much enlarged or curtailed.

Common carriers.

At common law a common carrier, that is, a person who holds himself out as carrying on the business of carrying the goods of all and sundry from place to place, is liable for any loss of, or injury to, the goods unless he can show that the loss was due to the act of God or the King's enemies, or to some inherent vice or unfitness to be carried of the goods themselves. A carrier of goods by sea is under the same liability, as also is an innkeeper. The common-law liability in all these cases has to some extent been modified by statute (*s*), and may always in any particular case be modified by agreement between the parties. Bailees who are under this special liability are sometimes (though not quite accurately) spoken of as "insurers."

ART. 82.—*Duty to take Precautions with regard to things Dangerous in themselves.*

(1) In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty imposed on those who send forth, make or leave about such articles to take

(*q*) See *ante*, Art. 18.

(*r*) See *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.]; and *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387.

(*s*) See notes to *Coggs* v. *Bernard* in 1 Sm. L. C. 173. As to innkeepers, see *Calye's Case* and notes in 1 Sm. L. C. 119.

Art. 82. precautions that they shall not do damage to persons who may come in contact with them (*t*).

(2) A person who without due warning supplies to others for use an instrument or thing which *to his knowledge*, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such instrument or thing is liable if damage is caused thereby (*u*).

(3) If damage is done by reason of the neglect of such precautions or warning, it is no excuse that the damage would not have happened but for the intermeddling of some third person, if such intermeddling is such as might naturally occur (*v*).

(4) But if the immediate cause of the damage is the conscious act of volition of some third person that is a defence, for no precaution can avail against such conscious act of volition (*v*).

Comment. The first rule is applicable to all things dangerous in themselves, such as those above described. The nature of the precautions to be taken must necessarily depend on the circumstances. In some cases it would be proper and sufficient to give warning of the danger so as to put persons on their guard against dangers which are not apparent from the nature of the thing. The following illustrations will show the nature of the precautions which the courts have held requisite in different circumstances (see also the closely allied rules stated in Arts. 88–90). In most of these cases the immediate cause of the damage has been the intermeddling of a third person. This is no defence

(*t*) *Per* Lord DUNEDIN in *Dominion Natural Gas Co.* v. *Collins and Perkins*, [1909] A. C. 640, 646 [P. C.]; *Blacker* v. *Lake & Elliot, Limited* (1912), 106 L. T. 533.

(*u*) *Per* COTTON and BOWEN, L.JJ., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 517 [C. A.]; *Bates* v. *Batey & Co., Limited*, [1913] 3 K. B. 351.

(*v*) See (*t*), *supra*.

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if such intermeddling is what would be naturally expected of a person who was unconscious of the danger or of the proper way to avoid it. "A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it"; yet in each of these circumstances the liability has been enforced. It is, however, another matter if a third person finding a loaded gun consciously fires it off at someone, or if a person who has bought poison consciously takes it himself or administers it to someone else. In such cases the damage is not caused by the absence of precautions, but by the wrongful act of the person who fires the gun or administers the poison.

Illustrations.

(1) Where the defendant entrusted a loaded gun to an inexperienced servant girl, and she pointed and fired it at the plaintiff's son, wounding and injuring him, it was held that the defendant was liable. He had given directions that the priming should be removed so as to make the gun safe, but this was not done properly and the gun was left in a dangerous state; so the defendant was responsible (*w*).

(2) Where the defendant negligently compounded a hair wash of dangerous chemical ingredients, and a person using it, and for whose benefit it was bought, suffered injury, the defendant was held liable (*x*). But this decision has not been followed in two recent cases where the manufacturers of articles which have caused damage to purchasers by virtue of defective manufacture have not been held liable for such damage, on the ground that as there was no contract between the parties no duty was owed by the makers to the injured purchasers (*y*).

(3) Quite apart from any warranty or the terms of the contract of sale, the vendor of goods which have some

(*w*) *Dixon* v. *Bell*, 5 M. & S. 198.

(*x*) *George* v. *Skivington*, L. R. 5 Ex. 1.

(*y*) *Blacker* v. *Lake & Elliott* (1912), 106 L. T. 533; *Bates* v. *Batey & Co., Limited*, [1913] 3 K. B. 351; *per contra White* v. *Steadman*, [1913] 3 K. B. 340; but here LUSH, J., appears to draw a distinction between things inherently dangerous and those which are dangerous by defective manufacture only.

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dangerous quality of which he knows, but of which the purchaser cannot be expected to be aware, owes a duty to the purchaser to take reasonable precautions by warning him that special care will be requisite, and for damages resulting from breach of that duty an action lies (*z*). Thus, where the defendants sold a tin of chlorinated lime, **knowing that it was likely to cause danger** to a person opening it unless special care was taken, and the danger was not such as would be known by the purchaser, the defendants were held liable for damage caused to the plaintiff by opening the tin without taking proper precautions, in consequence of which there was an explosion and her eyes were injured (*a*). And there is a similar duty on the part of one gratuitously lending goods to another, for breach of which, followed by damages, an action will lie. Note that in these cases it is essential to show knowledge of the defect on the part of the seller or lender (*b*). A person who does not make but merely sells a thing he does not know to be dangerous may be liable for breach of warranty to the buyer, but is not liable in tort to the buyer or to users of the thing (*c*).

(4) A railway company kept a turntable unlocked (and therefore dangerous to children) on their land close to a public road. The railway servants knew that children were in the habit of trespassing and playing with the turntable, and took no steps to prevent them from so doing or to lock the machine so as to prevent it being dangerous. A child between four and five years of age, playing with other children on the turntable, was seriously injured. The company were held liable as they should have taken precautions to prevent such an accident as was likely to happen, and did happen, to the child (*d*), because the presence of the dangerous unlocked turntable constituted an allurement which made the children invitees. In a later case (*e*), on

(*z*) *Heaven* v. *Pender* (1883), 11 Q. B. D. 517.

(*a*) *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155 [C. A.].

(*b*) *Bates* v. *Batey & Co., Limited*, [1913] 3 K. B. 351.

(*c*) *Longmeid* v. *Holliday*, 6 Ex. 761; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145 [C. A.].

(*d*) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A. C. 229.

(*e*) *Latham* v. *Johnson & Nephew, Limited*, [1913] 1 K. B. 398.

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analogous facts, where the injury to a child arose from playing with a heap of stones on defendants' ground, the heap of stones was held not to be an allurement nor to be a dangerous thing laying upon the defendants any other duties than those owed to mere licensees. In a more recent case warnings given repeatedly to children to go away from a company's premises to prevent them being injured by playing about a working staircase was held to constitute them trespassers and so without remedy for injuries resultant in disobedience to the warnings (*f*). So if a person leaves a cart unattended in the street and boys play with it, as is their nature, and one is injured, he may have a cause of action against the owner of the cart, although the action would not have happened but for the intermeddling of himself and his companions (*g*). But it is now clear that the owner of a vehicle left on the highway will not be liable for damage done by its being set in motion by third parties unless it was reasonable that he should have anticipated the effective interference which caused the damage (*h*).

(5) A person who consigns to a common carrier is under an absolute duty not to consign to him for carriage goods which are dangerous to carry, without warning the carrier of their dangerous character, unless the carrier knows, or ought to know, the dangerous character of the goods; and if by reason of their dangerous character the carrier or his servants are injured the consignor is liable, although he does not himself know of the dangerous character of the goods (*i*).

ART. 83.—*Contributory Negligence.*

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would not have happened had the plaintiff

(*f*) *Hardy* v. *Central London Rail. Co.* (1920), 36 T. L. R. 843.

(*g*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*h*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148. Cf. with *Turner* v. *Coates* (1916), 33 T. L. R. 79.

(*i*) *Bamfield* v. *Goole and Sheffield Transport Co.*, [1910] 2 K. B. 94 [C. A.].

Art. 83. himself used ordinary care, the plaintiff cannot recover from the defendant.

(2) But where the plaintiff's own negligence is only remotely connected with the accident, and the defendant might by the exercise of ordinary care have avoided the accident, the plaintiff will be entitled to recover.

Radley v. *London and North Western Rail. Co.*

The rule of contributory negligence is well illustrated by the leading case of *Radley* v. *London and North Western Rail. Co.* (*k*). In that case the facts were these: The defendants were in the habit of taking full trucks from the siding of a colliery company and returning empty ones. Over this siding was a bridge belonging to the colliery company. One Saturday afternoon the company ran some trucks on the siding. One was loaded so high that it would not pass under the bridge. On the Sunday evening the company brought some more trucks and pushed forward those already on the siding. Finding something was holding the trucks, the engine-driver put on more power and pushed till he got them on. It was the bridge which held the loaded truck, and the result was that the bridge was knocked down. Now, assuming that the colliery company were negligent in loading the truck so that it would not pass under the bridge, it does not follow that their negligence was an effective cause of the accident. It may be that if the engine-driver had been prudent and reasonable he should have got out to see what was wrong, and so would have avoided the consequences of the colliery company's negligence. In this view of the facts it was held that the judge who tried the case was wrong in telling the jury that the plaintiffs (the colliery owners) must satisfy them that the accident happened *solely* through the negligence of the defendants' servants, and that if both sides were negligent so as to contribute to the accident, the plaintiffs could not recover. He ought to have told them that if they thought **the engine-driver might by ordinary care have avoided all accident,** any previous negli-

(*k*) 1 App. Cas. 754. See especially, *per* Lord PENZANCE, at p. 759.

gence of the defendants would not preclude them from recovering. **Art. 83.**

Statement of the rule by WILLES, J.

The law on this point was thus summarised by WILLES, J.: "If both parties were equally to blame, and the accident *the result* of their joint negligence, the plaintiff could not be entitled to recover. If the negligence and default of the plaintiff was in any degree the *proximate cause* of the damage, he could not recover, however great may have been the negligence of the defendant. But that if the negligence of the plaintiff was only remotely connected with the accident, then the question was, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*l*). The doctrine of *Tuff* v. *Warman* has received a refinement of application in a recent case (*m*) where, despite the negligence of the plaintiff in crossing a level crossing when a train was approaching, and that the last opportunity to avoid the accident lay with the plaintiff, yet as the inability of the train driver to pull up in the space left was due to the faulty condition of his brake, it was held the company could not set up the contributory negligence of the plaintiff, as the last opportunity of avoiding the accident would have lain with their driver if his brake had been in good order, and so it was held to have lain constructively with them.

Illustrations.

(1) Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it and killed it, he was held to be liable; for he was bound to drive carefully and circumspectly, and **had he done so he might readily have avoided driving over the ass** (*n*). *Davies* v. *Mann.*

Butterfield v. *Forrester.*

(2) But where the defendant negligently and wrongfully left a pole across a highway, and the plaintiff, by riding negligently, ran against it and was hurt, it was held that as, if he had used ordinary care, he might have seen the pole and avoided it, the accident was entirely due to his own negligence, and the defendant was not liable (*o*).

(*l*) *Tuff* v. *Warman*, 2 C. B. (N.S.) 740, 743; affirmed in Ex. Ch., 5 C. B. (N.S.) 573.

(*m*) *British Columbia Electric Rail. Co.* v. *Loach*, [1916] A. C. 719.

(*n*) *Davies* v. *Mann*, 10 M. & W. 546.

(*o*) *Butterfield* v. *Forrester*, 11 East, 60.

Art. 83.

Joint negligence of plaintiff and defendant.

(3) But in all cases where two persons are negligent and the accident is the result of their joint negligence, neither can recover against the other. And so, in cases of collision between carriages, the question is, whether the sole effective cause of the disaster was the negligence of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the disaster would not have happened. In the former case he recovers, in the latter not.

Doctrine of identification.

(4) For many years it was thought that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*p*). However, this doctrine was overruled by the House of Lords, in the case of *The Bernina* (*q*), and there is no longer any rule of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the master of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*r*).

Contributory negligence in infants.

(5) It was decided many years ago that, where the plaintiff is a child of tender years, it is not necessarily a good defence to an action of negligence to prove that he himself contributed to his injury. In that case the defendant left a cart unattended in the street. The plaintiff, a boy of seven, climbed into the cart to play, another boy led on the horse, and the plaintiff fell and was hurt. If he had been a grown man it would have been a good defence that the proximate cause of the accident was his own wrongdoing—but the court held that as much care cannot be expected of a boy as of a grown person—and the act of the plaintiff, considering his age, was not such as to disentitle him from recovering (*s*). This case and the later authorities show that what would amount to contributory

(*p*) *Thorogood* v. *Bryan*, 8 C. B. 115.
(*q*) 13 App. Cas. 1.
(*r*) *Mathews* v. *London Street Tramways Co.*, 58 L. J. Q. B. 12.
(*s*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

negligence in a grown-up person, may not be so in a child of tender years (*t*). Art. 83.

(6) It has been held that where an infant is incapable of taking care of himself, he cannot recover if the person in whose charge he was, was guilty of contributory negligence (*u*). But whether this is consistent with principle seems questionable. For the person in charge is not the agent of the child, but of its parent or guardian; and in other respects the case of *The Bernina* (*x*) would seem to apply. Persons in charge of infants.

ART. 84.—*Effective Cause.*

The negligence of the defendant must be an effective cause of the damage.

As we have seen (*y*) wherever damage is a part of the cause of action, it must be shown that the damage complained of was the natural and probable result of the wrongful act. Illustrations will be found at pp. 14 and 15, many of which are cases of negligence. General principle.

It sometimes happens that though the defendant was negligent, the real effective cause of the damage was either the negligence of the plaintiff or the negligence of a third person. The former is dealt with as one aspect of contributory negligence. It is well illustrated by *Butterfield* v. *Forrester* (*z*). When the immediate cause of the damage is the interference of *a third party*, it does not necessarily follow that the defendant is not liable. If the defendant's negligence is *an effective cause* of the damage, he is liable, although the damage would not have occurred but for the interference of a stranger (*a*). It is, in every case, a Combined negligence of defendant and third party.

(*t*) *Per* KELLY, C.B., *Lay* v. *Midland Rail. Co.*, 34 L. T. 30. See also *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.]; *Jewson* v. *Gatti*, 2 T. L. R. 441 [C. A.]; and *Cooke* v. *Midland Great Western Rail. Co.*, [1909] A. C. 229.

(*u*) *Waite* v. *North Eastern Rail. Co.*, El. B. & E. 719 [Ex. Ch.]; and see *Taylor* v. *Dumbarton* (1918), S. C. 96 (H. L.).

(*x*) *Supra*, p. 180.

(*y*) *Supra*, Art. 5.

(*z*) *Supra*, p. 179.

(*a*) *Engelhart* v. *Farrant*, [1897] 1 Q. B. 243.

Art. 84. question of fact whether the negligence of the defendant was an effective cause of the damage or merely a remote cause (*b*).

Illustration. So where the defendant had taken the plaintiff's horse under an agreement for agistment and put it into a field separated by a wire fence from a cricket field, and by the negligence of the defendant's servants a gate was left open and the horse escaped into the cricket field, it was held to be the natural consequence that the cricketers should proceed to drive the horse back into the defendant's field. Whilst being so driven back the horse hurt itself against the wire fence, and the defendant was held liable, as the negligence of his servants in leaving the gate open was an effective cause of the accident (*c*).

ART. 85.—*Onus of Proof.*

(1) The onus of proving negligence is on the plaintiff: and that of proving contributory negligence on the defendant (*d*).

(2) But where a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things and using proper care, the accident itself affords *primâ facie* evidence of negligence (*e*).

Runaway horse. (1) Thus, where a horse of the defendant suddenly bolted without any explainable cause, and, swerving on to the footpath, collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no

(*b*) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331 [C. A.], and see *Rickards* v. *Lothian*, [1913] A. C. 263; *Ruoff* v. *Long*, [1916] 1 K. B. 148.

(*c*) *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

(*d*) *Dublin, Wicklow, etc. Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1169.

(*e*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Byrne* v. *Boadle*, 2 H. & C. 722.

negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*f*). **Art. 85.**

Skidding omnibus.

(2) So, also, the mere fact of a motor omnibus skidding on a greasy road is no evidence of negligence, for it is well known that roads are often greasy and that motor omnibuses, however well constructed and designed, have a tendency to skid on slippery roads (*g*).

Accident capable of two explanations.

(3) So where the body of a dead man was found on the defendants' railway near a level crossing, the man having been killed by a train which bore the usual head-lights but did not whistle, it was held, in an action by the widow, that there was no evidence of negligence on the defendants' part. For, as Lord HALSBURY said: "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" (*h*).

Accident *primâ facie* due to negligence.

(4) On the other hand, where a person was walking in a public street and a barrel of flour fell upon him from a window of the defendant's house, it was held sufficient *primâ facie* evidence of negligence to cast on the defendant the onus of proving that the accident was not attributable to his want of care. For barrels do not usually fall out of windows in the absence of want of care (*i*). And when a railway train was thrown off the line whereby the plaintiff (a passenger) was injured, and it appeared that the engine, the coaches and the line all belonged to the same company, it was held that there was a *primâ facie* case of negligence, as trains do not run off the line unless there is something

Res ipsa loquitur.

(*f*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

(*g*) *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652 [C. A.].

(*h*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41. See also *Davey* v. *London and South Western Rail. Co.*, 12 Q. B. D. 70 [C. A.].

(*i*) *Byrne* v. *Boadle*, 33 L. J. Ex. 13; *Scott* v. *London Dock Co.*, 3 H. & C. 596.

Art. 85. wrong with the line, or the train, or the running of the train (*j*). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must give some evidence of want of care. But where the probability is that the accident could only have had a negligent origin, the presumption will be reversed.

ART. 86.—*Duties of Judge and Jury.*

Whether there is any evidence to be left to the jury from which negligence causing the injury complained of may be reasonably inferred, is a question for the judge.

It is for the jury to say whether, and how far, the evidence is to be believed, and whether, in fact, there was negligence which was the effective cause of the damage (*k*).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is any evidence from which negligence may be reasonably inferred, and then leave it to the jury to find whether upon that evidence negligence ought to be inferred (*l*).

ART. 87.—*Volenti non fit Injuria.*

(1) In an action of negligence it is a good defence that the plaintiff, with full knowledge and appreciation of the risk of danger from the defendant's negligence, voluntarily accepted the risk and exposed himself to the danger (*m*).

(*j*) *Carpue* v. *London and Brighton Co.*, 5 Q. B. 747.

(*k*) *Metropolitan Rail. Co.* v. *Jackson*, 3 App. Cas. 193; *Toronto Ra l. Co.* v. *King*, [1908] A. C. 260.

(*l*) *Ibid.*, at p. 197.

(*m*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.

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(2) It is a question of fact, not of law, whether the plaintiff voluntarily incurred the risk, and the burden of proof is on the defendant (*n*).

(3) But the doctrine of acceptance of the risk cannot be set up in answer to an action for damages for negligence based on non-fulfilment of a statutory duty (*o*).

NOTE.—This rule must be applied with caution. It does not mean that whenever a person knows there is a risk of being injured by another's negligence whilst doing something, he is incapable of recovering in an action if, nevertheless, he does the thing with knowledge of that risk. If it were so, no one could ever bring an action for damages resulting from an accident to a train in which he was travelling, or even for being run over in the street. For everyone who travels by train or walks in the streets knows he runs a certain amount of risk in so doing. But if a person knowing of a particular risk **voluntarily accepts that risk and takes the risk upon himself,** the rule applies. For instance, if a man seeing an express train coming along a line approaching a level crossing, chooses to cross the line in front of it, taking the chance of getting across in time, the rule would apply.

Situations of alternative danger.

Again, the rule does not apply where one person is put by another in a situation of alternative danger, that is to say, one in which he will be in danger if he sits still and in danger if he tries to escape. In such a case any injury he may sustain in taking the course which he thinks best in the circumstances, will be regarded as the consequence of his being wrongfully put in that situation and not of his own voluntary act (*p*).

So, in an action against a coach proprietor for so negligently driving his coach that the plaintiff, a passenger, was

(*n*) *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338 [C. A.].

(*o*) *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423; cf. *Davies* v. *Owen*, [1919] 2 K. B. 39.

(*p*) *Per* MONTAGU SMITH, J., in *Adams* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 4 C. P. 739, 742; *The George and Richard*, L. R. 3 A. & E. 466.

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obliged to jump off the coach, whereby he broke his leg, Lord ELLENBOROUGH said: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach. It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported" (*q*).

Doctrine applied.

When a workman in the employment of a contractor engaged by the defendants had to work in a tunnel rendered dangerous by the passing of trains, and after working there a fortnight was injured by a passing train, it was held that the workman, **having continued in his employment with full knowledge,** could not make the railway company liable for an injury arising from the **danger to which he had voluntarily exposed himself,** although the railway company were guilty of negligence (*r*).

Yarmouth v. *France.*

The application of the rule has arisen chiefly in questions between employers and workmen, and in a case of this kind (under the Employers' Liability Act), Lord ESHER, M.R., stated the rule in the following words: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria.* If so, that is a question of fact" (*s*). And LINDLEY, L.J., added: "A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before, in order to avoid dismissal, a jury may, in my opinion,

(*q*) *Jones* v. *Boyce,* 1 Stark. 493.

(*r*) *Woodley* v. *Metropolitan District Rail. Co.,* 2 Ex. D. 384.

(*s*) *Yarmouth* v. *France,* 19 Q. B. D. 647, and see *Williams* v. *Birmingham Battery Co.,* [1899] 2 Q. B. 338 [C. A.].

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properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred " (*t*).

Smith v. *Baker.*

So, too, when a workman, engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily accepted the risk (*u*).

(*t*) *Yarmouth* v. *France*, 19 Q. B. D. 647.
(*u*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.

CANADIAN NOTES TO CHAPTER VII. OF PART II.

Article 77.

The general principles of the law of negligence, as defined in the text, are accepted throughout Canada.

For an application of these principles to the case of a physician see *Hampton* v. *Macl.dam* (1912), 22 W. L. R. 31; 7 D. L. R. 880, where the defendant, being called on to act in an emergency without the necessary equipment, was held to have done the best he could in the circumstances and was exonerated from liability.

In *Taylor* v. *Robertson* (1901), 31 S. C. R. 615, the Supreme Court pointed out that a lawyer could not be considered negligent who advised his client in accordance with a recent decision of the court before which the case was to be heard, although the decision in question was subsequently overruled.

Article 78.

The use of automobiles and other vehicles on the highways is now generally regulated by special statutes in the interest of the public safety. Compliance with these regulations is a duty which every person using the highway owes to all others. From this it follows that where an accident occurs through disregard of the statutory precautions the driver is liable in damages, even apart from the general law of negligence: *Stewart* v. *Steele* (1912), 5 Sask. L. R. 358; 22 W. L. R. 6; 2 W. W. R. 902; 6 D. L. R. 1.

The tendency of provincial legislation in Canada is to increase the liability of automobile owners, and in some cases the burden of proving due care is thrown upon the defendant. See *Lechie* v. *Sewrey*, [1918] 2 W. W. R. 386, illustrating R. S. Man. (1913), c. 131.

Article 79.

The liability of the carrier is not necessarily discharged by the fact that the passenger has forfeited his right to be carried. In *Dunn* v. *Dominion Atlantic Ry. Co.* (1920), 60 S. C. R. 310, a drunken passenger was put off a train

at a closed and unlighted station about one o'clock in the morning, and was subsequently found dead on the line, having evidently been run over by another train. The company was held liable for his death. But in another case where the passenger, though slightly drunk, was capable of looking after himself, and was put off at an open and lighted station, it was held that the company was not to blame for his death: *Delahanty* v. *Michigan Central Ry.* (1905), 10 Ont. L. R. 388.

It is also the duty of the company, so far as is reasonably possible, to protect passengers from the violence of drunken and disorderly fellow travellers: *Canadian Pacific Ry. Co.* v. *Blain* (1903), 34 S. C. R. 74; (1904), A. C. 453. This ruling is supported by a large number of American decisions.

The company owes no duty to a small boy who steals a ride on the cow-catcher: *Wallace* v. *Canadian Pacific Ry. Co.* (1912), 6 D. L. R. 864.

The relation of carrier and passenger does not necessarily terminate as soon as the passenger has alighted from the vehicle: see *Barr* v. *Toronto Ry. Co.* (1919), 46 Ont. L. R. 64, where the negligence consisted in improperly starting a street car round a curve before the passenger had reached the sidewalk.

Article 80.

In *King* v. *Northern Navigation Co.* (1912), 27 Ont. L. R. 79; 6 D. L. R. 69, the plaintiff's husband had been an engineer on the defendant's ship. While the ship was laid up for the winter he visited it for his own purposes, and was killed by falling through an unprotected hatchway. The court held that he was a bare licensee and that the company was not liable.

The student should refer to the careful analysis of the law on this subject by the High Court of Australia in *South Australian Co.* v. *Richardson* (1915), 20 C. L. R. 181; 9 B. R. C. 52. The plaintiff's husband in this case was a lorry driver, and the fatal accident was caused by his lorry colliding with some rails which projected above the level of the road on the company's premises. The defence relied upon the fact that the danger was visible. After judgement for the defendant in the trial court the High Court affirmed the decision of the Supreme Court of South Australia ordering a new trial. "In my opinion," said

Griffith, C.J., "the only material questions in the case are: (1) Whether the defendants invited the deceased to make use of the road for the purposes for which, and under the circumstances in which, he used it; (2) whether the road was reasonably safe for such use; and (3) if not, whether the deceased, either by using the road at all or in the manner of his use, failed to take reasonable care to avoid the consequences of the defendants' breach of duty, so far as he knew or ought to have known of it."

The occupier cannot escape liability by delegating his duty to an independent contractor, but he is not liable if the dangerous condition is due to *vis major*, such as a violent and unexpected storm: *Valiquette* v. *Fraser* (1907), 39 S. C. R. 1. See also *Stewart* v. *Cobalt Curling and Skating Association* (1909), 19 Ont. L. R. 667, where the railing of a gallery at a hockey match broke beneath the weight of the plaintiff: the defendants were held liable, although they had employed a competent architect.

The occupier is under a duty to passers-by, as well as to those entering the premises: see *Lamarche* v. *Les Rév. Pères Oblats* (1905), 29 Que. S. C. 138, where the plaintiff, walking on the street, was injured by the fall of a decayed branch from a tree on the defendant's land.

Since municipalities are usually bound by statute to keep the streets in repair, they are liable for accidents due to the icy condition of the sidewalks, if no attempt has been made to render them safe within a reasonable time: *Tuohey* v. *City of Medicine Hat* (1912), 7 D. L. R. 759; *City of Sydney* v. *Sluney* (1919), 59 S. C. R. 232.

Article 81.

In Quebec a bailee is known as a "depositary," and by Article 1802 of the Code he is "bound to apply in the keeping of the thing deposited the care of a prudent administrator (*bon père de famille*)." In substance this amounts to the same as the common law rule.

In Canada, as in England, the liability of the more important classes of bailees and depositaries, such as railway companies and hotel keepers, is now largely regulated by statute.

Article 82.

Some of the cases arising under this Article have been already considered under Article 17 and the note thereto.

It is submitted that the distinction drawn in some decisions between those objects which are "essentially dangerous" and those which are only dangerous through negligence in manufacture is founded upon no sufficient reason. See especially *Buckley* v. *Mott* (1919), 50 D. L. R. 408. Under the civil law also the manufacturer is delictually responsible for putting on the market goods that are dangerous owing to latent defects: *Lajoie v. Robert* (1916), 50 Que. S. C. 395; 33 D. L. R. 577.

ARTICLE 83.

The case of *British Columbia Electric Ry. Co.* v. *Loach* (1916), A. C. 719, cited in the text, is now the leading Canadian authority upon this question. It has been commented upon by Lord Justice O'Connor of the Irish Court of Appeal in the *Law Quarterly Review*, vol. 38, p. 17. For a recent application of the rule, see *Mercier* v. *Boudreau* (1921), 17 Alta. L. R. 100.

The law of contributory negligence is equally applicable to adults and to children, but with children the age and intelligence of the child must be considered in determining whether his conduct is in fact negligent. For example, in *Moran* v. *Burroughs* (1912), 27 Oat. L. R. 539; 10 D. L. R. 18, the defendant negligently allowed his son, a boy of twelve, to play with a loaded rifle. The plaintiff, a boy of about the same age, carelessly ran across the line of fire, and was injured. The Court of Appeal held that this negligence disentitled him to recover. So again it has been held that a boy of eight should have sufficient sense not to run needlessly in front of a street car: *Schwartz* v. *Winnipeg Electric Ry. Co.* (1913), 23 Man. L. R. 483; 12 D. L. R. 56. Cases such as *Cooke* v. *Midland & Great Western Ry. Co.* (1909), A. C. 229, really rest upon the temptation or implied invitation held out to the child to play in a dangerous place: they should not be interpreted to mean that a child cannot be debarred from recovering by reason of his own contributory negligence.

The case of *Waite* v. *North-Eastern Ry. Co.*, which is commented on adversely in para. (6) of the text, rests upon the doctrine of "identification" which led to the erroneous decision in *Thorogood* v. *Bryan*. Since this doctrine has now been definitely condemned by the House of Lords in *The Bernina* (1888), 13 A. C. 1, it would seem that *Waite's Case* can no longer be regarded as law.

CHAPTER VIII.

LIABILITY FOR BREACH OF DUTY TO PREVENT DAMAGE FROM DANGEROUS THINGS AND ANIMALS.

ART. 88.—*The Rule in Fletcher* v. *Rylands* (*a*).

(1) The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

(2) He can excuse himself by showing—

(a) That the escape was owing to the plaintiff's default.

(b) That the escape was the consequence of the act of God, or *vis major*.

(3) That the escape was due to the wrongful act of a stranger over whom the defendant had no control.

(4) The rule does not apply—

(a) Where the person charged has not himself brought, collected or kept the thing on his land.

(b) Where he has brought or collected and

(*a*) L. R. 1 Ex. 265 [Ex. Ch.]; affirmed in the House of Lords, *sub-nom. Rylands* v. *Fletcher*, L. R. 3 H. L. 330. The first paragraph of the Rule here given is quoted from the judgment of the Exchequer Chamber delivered by BLACKBURN, J. The other paragraphs are taken partly from that judgment and partly from later cases referred to in the explanatory note and illustrations. The application of this principle of liability to those who cause damage by the explosion of materials used in manufacturing processes is exemplified in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] W.N. 281.

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kept it not solely for his own purposes but wholly or in part for the benefit of the person who is damaged by its escape.

(c) If he has statutory authority for bringing, collecting or keeping it on his land.

(5) The defendant is only liable for the natural consequences of the escape.

Explanation.

The famous case of *Fletcher* v. *Rylands* (*b*) is the leading authority on this rule—in fact, perhaps the first case in which the rule was laid down with precision, though it had been applied in many earlier cases. In a very early case the rule was succinctly stated by saying that it is the duty of a man to keep his own filth in his own ground (*c*). In *Fletcher* v. *Rylands* the dangerous thing was a large body of water. The rule has also been applied to such things as electricity (*d*), yew trees (*e*), wire fencing (*f*), and sewage (*g*), and (with some modifications) is the foundation of the liability for damage done by animals and fire (*h*).

Principle of rule.

The principle of the rule is that a person who brings on his land for his own purposes a thing of the kind mentioned in the rule, must keep it at his peril, and is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

Excuses.

BLACKBURN, J., says: "He can excuse himself by shewing that the escape was owing to the plaintiff's default (*i*), or *perhaps* that the escape was the consequence of *vis major*, or the act of God; but as nothing of this

(*b*) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(*c*) *Tenant* v. *Goldwin*, 1 Salk. 360; 2 Lord Raym. 1089.

(*d*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381 [P. C.].

(*e*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(*f*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254.

(*g*) *Tenant* v. *Goldwin*, *supra*; *Ballard* v. *Tomlinson*, 29 Ch. D. 115 [C. A.]; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648 [C. A.].

(*h*) See Arts. 89. 90.

(*i*) See Art. 11, *ante*.

sort exists here it would be unnecessary to inquire what excuse would be sufficient " (*j*). Art. 88.

This leading case is then an authority for saying that failure to keep from escaping a dangerous thing brought on your land for your own purposes gives rise to a *primâ facie* liability for the damage naturally resulting from such escape. It goes no further than this, as no evidence was brought before the court to provide excuses for the escape of the water, and so to rebut the *primâ facie* case against the defendant.

Illustrations. *Rylands* v. *Fletcher.*

(1) The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and **employed competent persons** to construct it. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. The gist of the action was the collecting of the water and *not keeping it from escaping*, and to the *primâ facie* case raised by these facts the defendants offered no answer (*j*).

In 1875 the next important case (*k*) which followed this decision raised the question of what would amount to an answer to the *primâ facie* case set up in *Rylands* v. *Fletcher*; and it was decided that in the absence of negligence on the part of the defendant act of God or *vis major* causing the escape of the dangerous thing amounts to an excuse, and such defendant is consequently not liable for the resultant damage.

(*j*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L., at p. 340.

(*k*) *Nichols* v. *Marsland*, 2 Ex. D. 1 [C. A.]; *Greenock Corporation* v. *Caledonian Rail. Co.*, [1917] A. C., distinguished at bottom of p. 573.

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Act of God.

(2) On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream, which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools by successive weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools, being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the pools, and that the flood was so great that it **could not reasonably have been anticipated.** The court found that this was in substance a finding that the escape of the water was caused by the act of God or *vis major*, and that accordingly the defendant was not liable (*l*).

This was followed in 1879 (*m*) by a decision that where a third party over whom the defendant has no control brings a dangerous article on to defendant's land and thereby causes this new danger and the defendant's article to escape, in the absence of negligence on the part of the defendant he is not liable for the damage resulting from the third party's action.

Box v. *Jubb*.

Third party bringing thing on to defendant's land.

(3) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; for the overflow was not caused by anything which he had done, nor had he any reasonable means of preventing it. As POLLOCK, B., said: "Here this *water has not been accumulated by the defendants*, but has come from elsewhere and added to that which was properly and safely there. For this the defendants . . . cannot be held liable" (*m*).

(*l*) *Nichols* v. *Marsland*, *supra*.
(*m*) *Box* v. *Jubb*, 4 Ex. D. 76.

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In 1913 the Judicial Committee of the Privy Council decided that where the escape of the dangerous article is caused by the malicious act of a third person over whom the defendant had no control, and without negligence on the part of the defendant, the latter is not liable for damage which results from such escape (*n*).

(4) Where the defendant was lessee of a building and plaintiff his tenant of part of the second floor, the plaintiff's premises were damaged through the flow of water from the lavatory on the fourth floor due to the turning on of the water-taps and plugging up of the waste-pipes by the malicious act of a third person over whom the defendant had no control, it was held that as no negligence on the part of defendant was shown and as it was not reasonable that the defendant should have anticipated the interference of the third party which actually caused the escape of the water, the defendant could not be said to have caused its escape and in consequence was not liable (*n*). A distinction was drawn in this case between the natural and non-natural user of property (*o*).

Escape of water falling on land.

It has been held that this rule does not apply where the water which escapes has accumulated on the defendant's land by *natural causes*, and the defendant has done nothing to cause it to accumulate (*p*), and has taken no active means to cause it to escape on to his neighbour's land (*q*).

Not for his own purposes.

(5) The defendant was owner of a house which he let out in floors to separate tenants. The different floors were supplied with water from a cistern at the top of the house. One of the supply pipes burst and the plaintiff's tenement, in the basement, was flooded. As the defendant had stored the water for the benefit of the plaintiff (along with the other tenants) he was not liable in the absence of

(*n*) *Rickards* v. *Lothian*, [1913] A. C. 263.

(*o*) [1913] A. C., at p. 280; and compare the reasoning in this case with that in *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148.

(*p*) *Wilson* v. *Waddell*, 2 App. Cas. 95; and see *Fletcher* v. *Smith*, 2 App. Cas. 781.

(*q*) *Whalley* v. *Lancashire and Yorkshire Rail. Co.*, 13 Q. B. D. 131 [C. A.].

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negligence (*r*). And the same rule applies where water is stored partly for the plaintiff's benefit and partly for the defendant's (*s*).

Yew trees and thistles.

(6) If a person plants on his own land yew trees and they grow so that the branches project over his neighbour's land, and his neighbour's horses and cattle eat of them and are poisoned, the person planting the yew trees is liable for this natural consequence of their escape (*t*). But he is not liable if his neighbour's cattle stray on to his land and eat them; for it is his neighbour's duty to keep his cattle from straying (*u*). Also a landlord is not liable if he lets premises adjoining his own with his yew trees overhanging the premises let at the time the letting begins, for the tenant must take the premises as he finds them (*v*). Nor is he liable if he **has not planted them** on his land and clippings escape on to his neighbour's land without his knowledge (*w*). So also a person is not liable for the escape from his land of thistle seeds, when the thistles have grown naturally on his own land (*x*).

ART. 89.—*Damage by Animals.*

(1) A person who keeps a **wild animal** or a **domestic animal known by him to be vicious** keeps it at his peril, and is liable for all the natural consequences of his not keeping it securely, such as attacks on mankind (*y*).

(2) A person who keeps a *dog* is liable for any injury it causes to cattle, sheep, horses, etc.,

(*r*) *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602 [C. A.].

(*s*) *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Whitmores Edenbridge, Limited* v. *Stanford*, [1909] 1 Ch. 427.

(*t*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5, explaining *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*u*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281.

(*v*) *Cheater* v. *Cater*, [1918] 1 K. B. 247.

(*w*) *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*x*) *Giles* v. *Walker*, 24 Q. B. D. 656.

(*y*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258 [C. A.]; *Baker* v. *Snell*, [1908] 2 K. B. 825.

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although he does not know it has any propensity to attack them (*z*).

(3) A person who keeps a dog or other domestic animal is not liable for the consequences of its attacking mankind unless he keeps it with knowledge that it has a propensity to attack mankind (*a*).

Explanations.

Animals are of two kinds in law :

(i) **Wild animals,** *i.e.*, animals which are not ordinarily kept in captivity in this country.

This class includes elephants (*b*), bears (*c*), monkeys (*d*), and doubtless many others. These animals a man keeps at his peril, whether or not he knows that the particular specimen is dangerous.

(ii) **Domestic animals,** including dogs (*e*), horses (*f*), bulls (*g*), rams (*h*), and others.

These animals are not, in theory of law, necessarily dangerous, and an owner does not keep them at his peril, unless in the particular case he knows the animal is dangerous. If he knows the animal is dangerous he keeps it at his peril just as if it were a wild animal (*i*). The case of *Baker* v. *Snell* (*j*) is quoted as the authority for saying that the keeper of an animal known to be dangerous keeps it at his peril and is liable for damage, however

(*z*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1).

(*a*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430 ; *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109 ; but see *Clinton* v. *J. Lyons & Co., Limited*, [1912] 3 K. B. 198.

(*b*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258.

(*c*) *Besozzi* v. *Harris*, 1 F. & F. 92.

(*d*) *May* v. *Burdett*, 9 Q. B. 101.

(*e*) *Baker* v. *Snell*, [1908] 2 K. B. 825.

(*f*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430.

(*g*) *Hudson* v. *Roberts*, 6 Ex. 697.

(*h*) *Jackson* v. *Smithson*, 15 M. & Q. 563.

(*i*) But a man is not liable for what is done by a dog belonging to his seventeen-year-old daughter who lives with him (*North* v. *Wood*, [1914] 1 K. B. 629).

(*j*) [1908] 2 K. B. 825.

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Scienter. Knowledge of the savage character of an animal is usually called *scienter*. The plaintiff in suing for damages for a bite of the defendant's dog must always prove *scienter*.

(*k*) L. R. 10 Ex. 255. (*l*) L. R. 1 Ex. 265.
(*m*) [1913] A. C. 263.

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If he does not, he will fail. In the case of dogs, it is usually proved by evidence that the dog has, to the knowledge of the defendant, on a previous occasion bitten or attempted to bite a human being (*n*). It may be proved in other ways, as, for instance, by evidence that the defendant had told people "to beware of the dog" (*o*). It must be proved that the dog was known to be "**accustomed to bite mankind.**" Accordingly it is not enough to prove a previous tendency to bite other animals—for an animal may be disposed to bite other animals and yet not savage *qua* human beings (*p*).

It has been held that, if the owner of the dog appoints a servant to *keep it*, the servant's knowledge of the animal's disposition is the knowledge of the master, for it is knowledge acquired by him in relation to a matter within the scope of his employment (*q*). But if another basis for the action can be found, *e.g.*, trespass, then the need to prove *scienter* no longer exists (*r*).

Dogs Act, 1906.

At common law an action did not lie against an owner of a dog which bit or worried sheep or cattle, without proof of *scienter*. But now this is altered by statute (*s*), and the owner is liable in damages for injury done to any cattle, horses, mules, asses, sheep, goats or swine, and it is not necessary to prove the previous mischievous propensity of the dog.

Bulls.

Scienter must be proved even in the case of such animals as bulls and rams, though it is well known that they are often dangerous; but no proof of *scienter* is necessary where a human being is attacked by the usually harmless elephant. He is in contemplation of law a wild animal which any person keeps at his peril (*t*).

(*n*) A proof of an *attempt* to bite is enough (*Worth* v. *Gilling* L. R. 2 C. P. 1).

(*o*) *Judge* v. *Cox*, 1 Stark. 285; *Hudson* v. *Roberts*, 6 Ex. 697.

(*p*) *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*q*) *Baldwin* v. *Casella*, L. R. 7 Ex. 325.

(*r*) *Theyer* v. *Purnell*, [1918] 2 K. B. 333.

(*s*) Dogs Act, 1906 (6 Edw. 7, c. 32), ss. 1, 7, repealing and (on this point) re-enacting the Dogs Act of 1865 to the same effect.

(*t*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258.

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Animals straying on to highway.

Though it is the duty of an owner of a domestic animal to keep it on his own land, and he may be liable if it escapes on to a highway for such damage as an animal of the kind would be likely to do, yet he is not liable for all the consequences of its escape. Thus, if a horse not known to be dangerous escapes, the owner will not be liable for the biting or kicking a human being (*u*).

So, too, where a fowl straying on a highway was frightened by a dog, and flew into the spokes of the wheel of a passing bicycle, and the bicyclist was thereby thrown and injured, it was held that this was **not** a natural consequence of the straying of a fowl (*v*).

Animals straying from highways.

It may be added that where a person is lawfully using a public highway for driving an animal, he is not under an absolute liability to prevent it from straying. If without negligence on his part it leaves the highway and does damage to an adjoining owner's land, he is not liable; for, though a man must keep his animals from trespassing from his own land on to his neighbour's, there is no obligation on persons using a highway to fence it, and the owner of land adjoining a highway must protect himself (*w*). Of course this will not justify wilful trespass, or even negligence in allowing animals to trespass from a highway.

Trespass by domestic animals.

There is a duty on a man to keep his cattle in; and if they stray on another's land he is liable in trespass for the natural and direct consequences of their so doing. So, if a horse gets out of a field through a defective fence and trespasses on another's land, the owner is liable even for damage it does by kicking another horse, that being a natural consequence of the trespass (*x*). And even if a horse merely kicks another **through a fence,** the owner may be liable, as it is a trespass even to put one foot over

(*u*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430; *Jones* v. *Lee* (1912), 106 L. T. 123.

(*v*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345; and compare *Higgins* v. *Searle*, 100 L. T. 280 [C. A.], damage resulting from a sow's fright at the horn of a passing motor.

(*w*) *Tillett* v. *Ward*, 10 Q. B. D. 17. The owner of cattle straying on to land is bound to remove them within a reasonable time, *i.e.*, reasonable in all the circumstances (*Goodwyn* v. *Cheveley*, 4 H. & N. 631).

(*x*) *Lee* v. *Riley*, 18 C. B. (N.S.) 722.

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the boundary of another's land (*y*). As between two adjoining owners of land there may, however, be a duty imposed on one by grant or prescription to fence for the benefit of the other. If animals stray by reason of a neglect of this duty, such straying is not actionable (*z*).

Liability to trespassers.

In *Lowery* v. *Walker* (*a*) it was held in the Court of Appeal that an occupier of land who kept on it a horse which he knew was bad-tempered and prone to bite, was **not liable to a trespasser** who was bitten. In the House of Lords the decision was reversed on the ground that the plaintiff was not a trespasser; but the decision in the Court of Appeal seems to be sound, on the assumption that the plaintiff was a trespasser. If it were not so, no farmer could safely keep a savage bull. But towards licensees the general proposition applies, and the owner is bound to secure them from injury by an animal which he knows to be savage.

ART. 90.—*Duty to keep Fire from doing Mischief.*

(1) If a person **intentionally** makes a fire on his land he must see that it does no harm to others and answer the damage if it does (*b*).

(2) If a person **by his negligence** allows a fire to arise on his land he is liable if it spreads to his neighbour's land and does damage (*c*).

(3) If a fire **accidentally** arises on a person's land and it spreads without negligence on his part he is not answerable (*d*).

(*y*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.

(*z*) See *Boyle* v. *Tamlyn*, 6 B. & C. 329.

(*a*) [1910] 1 K. B. 173 [C. A.]; reversed, [1911] A. C. 10.

(*b*) *Tubervil* v. *Stamp*, 1 Salk. 13.

(*c*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Filliter* v. *Phippard*, 11 Q. B. 347.

(*d*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86, not limited to the metropolis. See *Filliter* v. *Phippard*, 11 Q. B. 347; and as to what is and what is not an accidental fire, see *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43.

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(4) Where a person brings fire into dangerous proximity to another's land **without statutory authority** he does so at his peril, and is liable if it does damage (*e*). If he has statutory authority he is only liable if the damage results from negligence in using his statutory powers (*f*).

Explanation.

Fire is obviously a thing which, if not kept within bounds, may do great mischief, and the common law rule seems to be that a person lights any fire on his land or in his house **at his peril**; though he is not liable for damage done by a fire which begins accidentally (*i.e.*, without negligence) or is lighted by a third person.

Illustrations.

Where the defendant's servant, cleaning his car in plaintiff's garage, turned the starting handle and a flame shot up from the carburettor, whereupon the servant neglected at once to turn off the petrol supply tap, with the result that the fire extended to the tanks and thence damaged plaintiff's garage, it was held that s. 86 of the Fires Prevention (Metropolis) Act, 1774, was no defence, because (1) the fire which caused the damage was not the fire in the carburettor, but the subsequent one in the petrol tanks caused by the servant's neglect to turn off the petrol supply tap; (2) that the statute left unaffected the common-law liability of the defendant as owner of a potentially dangerous thing which causes damage. Defendant was therefore liable (*g*).

Liability of railway companies.

A person who, without statutory authority, uses a steam-engine on a highway or a railway, is liable for all damage done by escaping sparks setting fire to crops, etc., quite apart from negligence. He uses the fire at his peril (*h*). But railway companies which have statutory authority for using locomotives are, as we have seen, protected by their

(*e*) *Mansel* v. *Webb* (1918), 88 L. J. K. B. 323.

(*f*) *Jones* v. *Festiniog Rail. Co.*, L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597 [C. A.]; *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14 [Ex. Ch.].

(*g*) *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43.

(*h*) *Jones* v. *Festiniog Rail. Co.*, L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597; *Mansel* v. *Webb*, *supra*; cf. *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652,

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statutory authority from this absolute liability, and are, at common law, not liable for fires caused by sparks without negligence (*i*). But they are liable if they cause fires by their negligence (*j*). But when the statutory authority is not directive but discretionary due consideration must be given to the rights of others (*k*).

Railway Fires Act, 1905.

By the Railway Fires Act, 1905 (*l*), railway companies are made responsible for damage done to agricultural land or agricultural crops by fire arising from sparks from locomotive engines, **notwithstanding that the engine is used with statutory authority,** provided the claim for damage does not exceed £100. Railway companies are by the same Act given powers of entering on land for the purpose of extinguishing or arresting fire, and of doing certain things to diminish the risk of fire.

(*i*) *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679 Ex. Ch.].

(*j*) *Smith* v. *London and South Western Rail. Co.*, L. R. 6 C. P. 14 [Ex. Ch.].

(*k*) *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B. 866.

(*l*) 5 Edw. 7, c. 11.

CANADIAN NOTES TO CHAPTER VIII. OF PART II.

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The doctrine of *Fletcher* v. *Rylands* was applied by the Privy Council in the Quebec case of *Quebec Light, Heat, and Power Co.* v. *Vandry* (1920), A. C. 662, where the damage was caused by high tension electric wires being blown down in a storm. The wording of the Code (Art. 1054) makes a defendant liable for damage caused "by things which he has under his care," but the accepted doctrine is that these words refer only to things of an exceptionally dangerous nature.

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In *Connor* v. *Princess Theatre* (1912), 27 Ont. L. R. 466; 10 D. L. R. 143, the court held that where wild animals are kept for any legitimate purpose the keeper is free from liability, provided that he can shew that he took all proper precautions for safe custody, having regard to the dangerous character of the animal in question. In this case the damage was caused by a monkey which was kept in the custody of one of the performers, not on the theatre premises, but in an adjoining yard.

Article 1055 of the Quebec Code makes an owner liable for the damage caused by his animals, but this has been interpreted to mean that he can escape liability if he proves that he took all proper precautions and could not have prevented the damage: *Du Tremble* v. *Poulin* (1917), 48 Que. S. C. 121. If the animal was under the control of the owner at the time of the injury, the case must be decided according to the general rules of negligence under Article 1053: *Denis* v. *Kennedy* (1914), 16 Que. S. C. 459. The Quebec law draws no distinction between different classes of animals.

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Whether in the forests or on the prairies the danger from fire is such a serious menace in Canada that all the prov-

inces have found it necessary to supplement the common law rules of liability by special statutory regulations, which usually prescribe in detail the precautions that must be taken by any person who starts a fire. Neglect of the statutory precautions is sufficient to make a defendant liable: *Bettger* v. *Turner* (1914), 27 W. L. R. 625; 16 D. L. R. 181. See also *Moseley* v. *Ketchum* (1910), 3 Sask. L. R. 29, where the policy of the statutes is reviewed: *Imperial Oil Co.* v. *Bashford* (1912), 4 Sask. L. R. 360.

By section 298 of the Railways Act (R. S. C. c. 37), railway companies are made liable, irrespective of negligence, for fires caused by locomotives, but the total liability for any one fire is limited to $5,000, provided that all proper precautions have been taken, and the court may apportion this sum, if there is more than one plaintiff. Railway companies are also bound to comply with the rules laid down in the provincial statutes.

CHAPTER IX.

LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR SERVANTS AND WORKMEN.

SECTION I.—COMMON-LAW LIABILITY.

We have seen (*ante*, Art. 27) that generally a master is liable for the negligence of his servants committed in the course of their employment; but the liability of a master **to his servant** for an injury resulting from the negligence of a fellow-servant differs materially from his liability **to a third party** for a similar injury, by reason of the common-law rule that a master is not so liable where the injurer and the injured are the servants of a common master in a common employment, and the injury was inflicted in the course of that employment.

Common employment

This rule, known as the doctrine of common employment, was founded on the idea that the servant takes all the risks incident to his employment as part of the contract of service. With regard to servants generally it still exists, but with regard to certain classes of servants Parliament has of late years made large exceptions to it (1) by the Employers' Liability Act, 1880, and (2) by the Workmen's Compensation Act, 1906. **The Employers' Liability Act, 1880, does not abolish the doctrine of common employment,** but it gives a remedy by action for damages in certain specific cases to servants who are injured by the negligence of their fellow-servants in the course of their employment.

Employers' Liability Act.

Workmen's Compensation Act

The Workmen's Compensation Act does not abolish the doctrine of common employment or repeal the Employers' Liability Act, but it gives to all servants to whom it applies a statutory right to be compensated by their masters for accidents suffered by them in the course of and arising out of their employment, whether such accidents are caused by the negligence of a fellow-servant or not. In

other words, it gives to servants to whom it applies a right to compensation quite independent of any tort whatever. Its consideration, therefore, does not fall strictly within the scope of this work. But the importance of the subject is such that the student may reasonably expect to find some account of the Act and its main provisions.

ART. 91.—*The Doctrine of Common Employment.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment.

(2) The doctrine only applies when there is both a common master and common employment under that master.

(3) Common employment does not necessarily imply that both servants should be engaged in the same or even similar acts, or in the same grade of employment, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which must be contemplated as incident thereto (*a*). And the defence of common employment is good against an infant (*b*).

(4) A master who is personally negligent is liable to his servant for damage resulting from such negligence; and such negligence may consist in—

(a) employing another servant knowing him to be incompetent or without making

(*a*) *Morgan* v. *Vale of Neath Rail. Co.*, L. R. 1 Q. B. 149 [Ex. Ch.]; *Allen* v. *New Gas Co.*, 1 Ex. D. 251.

(*b*) *Heasmer* v. *Pickfords, Limited* (1920), 36 T. L. R. 818.

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proper inquiries as to his competence (*c*);

(b) retaining in his employment a servant whom he knows to be habitually negligent (*d*);

(c) allowing the premises, plant or machinery to be in a dangerous condition, when he knew or might have known they were dangerous (*e*);

(d) breach of an absolute unqualified duty imposed upon the employer by statute to do something for the protection of workmen (*f*).

Explanation of rule.

The rule was first established in *Priestley* v. *Fowler* (*g*). In that case a butcher's man was ordered to deliver meat from a van. The van was overloaded by the negligence of a fellow-servant, in consequence of which it broke down and the butcher's man was hurt. The master was held not liable.

It was further established in *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (*h*), in which it was held that where a servant of a railway company in discharge of his duty as such was proceeding in a train under the guidance of other servants of the company, through whose negligence a collision took place, and he was killed, his personal representatives had no cause of action. The foundation of the doctrine is "that, under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and

(*c*) *Tarrant* v. *Webb*, 18 C. B. 797.

(*d*) See *Senior* v. *Ward*, 28 L. J. Q. B. 139.

(*e*) *Williams* v. *Birmingham Battery, etc. Co.*, [1899] 2 Q. B. 338 [C. A.].

(*f*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.]. See *Butler* v. *Fife Coal Co.*, [1912] A. C. 149; *Watkins* v. *Naval Colliery Co.*, [1912] A. C. 693.

(*g*) (1837) 3 M. & W. 1.

(*h*) (1850) 5 Ex. 343.

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cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself" (*i*).

Illustrations

Common employment.

(1) The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves; all these are fellow-servants within the meaning of the doctrine (*j*); and so are the captain of a ship and the sailors employed under him (*k*); and the scene-shifter and the chorus girl engaged to sing in a pantomime (*l*).

(2) In *Morgan* v. *Vale of Neath Rail Co.* (*m*), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held, however, that he could not recover against the company; on the ground that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment.

(3) Where a workman was, after his day's work was done, going home in a train which the colliery company ran voluntarily for the convenience of the colliers and was killed by the negligence of a servant of the company

(*i*) *Per* COLLINS, M.R., in *Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907] 1 K. B. 544 [C. A.], at p. 554.

(*j*) *Barton's Hill Coal Co.* v. *Reid*, 4 Jur. (N.S.) 767 [H. L.].

(*k*) *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q. B. 58 [C. A.].

(*l*) *Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907] 1 K. B. 544.

(*m*) L. R. 1 Q. B. 149 [Ex. Ch.].

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employed in mending a bridge, it was held that the collier and the other were in common employment, though the accident happened whilst the deceased was not being actually employed, as he must be deemed to have undertaken the risk of such an accident (*n*).

Common master but not common employment.

(4) But when a collision occurred between two steamships belonging to the same owners, it was held that the crew of ship A. were not in common employment with the crew of ship B. (although employed by the same masters), so as to protect the owners from liability to the crew of ship A. for the negligence of their servants, the crew of ship B. (*o*).

Common employment but not common master.

(5) Where one of two railway companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply, for the men though in common employment are not in the employment of a common master (*p*).

(6) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor, for the servant of the contractor is not the servant of the contractor's employer; or where the person injured is a servant of one contractor, and the person by whose negligence he is injured is the servant of another contractor (*q*).

Personal negligence of master

(7) Whilst a workman was in the course of his employment descending from an elevated tramway belonging to his employers his foot slipped and he fell to the ground and received injuries. His employers had provided no ladder or other safe means of descending from the tramway. In an action brought against the employers it was proved that it was dangerous to descend without a ladder, and that

(*n*) *Coldrick* v. *Partridge, Jones & Co.*, [1910] A. C. 77.

(*o*) *The Petrel*, [1893] P. 320.

(*p*) *Warburton* v. *Great Western Rail. Co.*, L. R. 2 Ex. 30; *Swainson* v. *North Eastern Rail. Co.*, 3 Ex. D. 341 [C. A.].

(*q*) *Johnson* v. *Lindsay*, [1891] A. C. 371.

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the employers knew this, and knew there was no ladder. On this it was held they were liable for personal negligence. If proper appliances had been provided and they had got out of order without the knowledge of the employers they would not have been liable (*r*).

(8) A workman was injured in consequence of a breach by his employer of a statutory duty to maintain fencing for dangerous machinery, imposed by the Factory and Workshop Act, 1878. For the breach of this absolute duty he had a right of action, and it was no defence that the defect in the fence was due to the negligence of a fellow-workman (*s*).

ART. 92.—*Volunteer Servants—Volenti non fit Injuria.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, the doctrine of common employment applies, and no action will lie *at common law* against the master.

Explanation.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. He has taken upon himself the risk of the common employment, and he cannot impose on the master a greater liability than that in which the master stands towards his own servants.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negli-

(*r*) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338 [C. A.].

(*s*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.].

gently propelled a locomotive against, and so killed, the volunteer, it was held that the company was not liable (*t*). **Art. 92.**

Where a person aids the servants of another, with such other's consent or acquiescence, and not as a mere volunteer, but for the purpose of expediting some business of his own, he is not considered to be in a position of a servant *pro tempore* and consequently can recover (*u*). Exception.

SECTION II.—THE EMPLOYERS' LIABILITY ACT, 1880 (*v*).

ART. 93.—*Epitome of Act.*

(1) In the case of railway servants, labourers, husbandmen, journeymen, artificers, handicraftsmen, miners, and other persons engaged in **manual** labour and **not being domestic or menial servants,** an employer cannot set up the defence of common employment in any case where the injury complained of is due to any of the following causes, viz. :

(a) A defect in the condition of the ways, works, machinery, or plant which arose from, or had not been discovered or remedied owing to the *negligence* of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition. This includes original defectiveness or unsuitability for its task of the plant, etc., employed.

(*t*) *Degg* v. *Midland Rail. Co.*, 1 H. & N. 773 ; *Potter* v. *Faulkner*, 1 B. & S. 800 [Ex. Ch.].

(*u*) *Wright* v. *London and North Western Rail. Co.*, 1 Q. B. D. 252 [C. A.] ; and see *Hayward* v. *Drury Lane Theatre, Limited*, [1917] 2 K. B. 899.

(*v*) 43 & 44 Vict. *c.* 42.

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(b) The *negligence* in the exercise of superintendence of any person in the service of the employer whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour.

(c) The *negligence* of a person in the employment of the master to whose orders or directions the servant at the time of the injury was bound to conform and did conform.

(d) An act or omission of any person in the service of the employer done or made **in obedience to the rules or byelaws of the employer** (not approved by a Government department), or **in obedience to particular instructions** given by any person delegated with the authority of the employer.

(e) The **negligence** of any person in the service of the employer having the charge or control of any signal-points, locomotive-engine, or train upon a railway.

But the workman injured in each of the above cases cannot recover if he knew of the negligence or defect and did not complain of it to a superior within a reasonable time, unless he was aware the superior or employer already knew of such negligence or defect.

(2) The injured servant, or his representatives, must give notice of his claim to the employer within six weeks of the accident, unless, in case of death, the judge thinks there was reasonable excuse for not giving it.

(3) The action must be commenced by the injured servant within six months, or by his personal representatives (if he is killed) within twelve months.

(4) The action must be brought in the County Court, but is removable, under very exceptional circumstances, to the High Court.

(5) The damages are limited to three years' average earnings; which is the maximum award, not the basis of calculation.

(6) The action is an action for negligence, and any defence available at common law (except that of common employment) is good (*w*), as, for instance, contributory negligence (*x*), *volenti non fit injuria* (*y*), or that the workman has contracted himself out of the Act (*z*).

Class of servants to which the Act applies.

It will be perceived that this Act applies only to a limited class of employees. Thus, a grocer's assistant is not a person engaged in manual labour within the meaning of the Act (*a*); nor is the driver of a tramcar (*b*); nor an omnibus conductor (*c*). And it only applies to accidents happening by reason of negligence of the specific kinds enumerated in the Act. It does not abolish the doctrine of common employment generally, nor on the other hand does it give an injured servant a right of action unless he can prove negligence on the part of the master or some fellow-servant of the kind specified.

(*w*) *Per* SMITH, J., in *Weblin* v. *Ballard*, 17 Q. B. D. 122, at p. 125.

(*x*) *Stuart* v. *Evans*, 31 W. R. 706.

(*y*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685 [C. A.]. See *Yarmouth* v. *France*, *ante*, p. 187.

(*z*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357.

(*a*) *Bound* v. *Lawrence*, [1892] 1 Q. B. 226 [C. A.].

(*b*) *Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683.

(*c*) *Morgan* v. *London General Omnibus Co.*, 13 Q. B. D. 832 [C. A.].

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SECTION III.—THE WORKMEN'S COMPENSATION ACT, 1906.

The Workmen's Compensation Act, 1897, created a new kind of liability by making a master liable to pay compensation at a fixed rate to his servant if he was incapacitated by accident happening to him in the course of his employment, and to those dependent on the servant if he was killed by such accident.

The Act of 1897 was somewhat limited in its application. It was extended by the Act of 1900; and in 1906 both those Acts were repealed and the present Act was substituted for them. That Act again extended the application of the earlier Act, while preserving its main principles.

It must be kept in mind that *liability to pay compensation arises independently of any neglect or wrongful act* on the part of the master or his servants. And, strictly speaking, its consideration does not belong to the law of torts at all. The liability to pay compensation is not one arising out of tort, but is an incident attached by statute to the relation of master and servant. Moreover, the amount payable is fixed by a scale, and depends not on the amount of suffering caused to the workman, or on the expenses caused by his illness, but on the difference between his wages-earning capacity before and after the accident. But the subject is so closely connected with that of the Employers' Liability Act that it is convenient here to give a slight sketch of the main principles of the Act.

ART. 94.—*Liability to Pay Compensation.*

(1) To entitle a workman to compensation he must show *either*—

(A) (i) That he has suffered personal injury by accident, and

(ii) That the "injury by accident" *arose out of his employment*, and

(iii) That the "injury by accident" *arose in the course of his employment*, and Art. 94.

(iv) That the injury has disabled him for at least one week from earning full wages at the work at which he was employed (*d*), *or*

(B) That by reason of his suffering from an "industrial disease," due to the nature of his employment, he has been disabled for at least one week from earning full wages at the work at which he was employed. This includes the consequences of an operation necessitated by an industrial disease (*e*).

(2) Where the injury by accident or industrial disease results in death the workman's dependants are entitled to compensation (*f*). "Dependants" means members of the family who were, in fact, wholly or in part dependent on his earnings (*g*).

Comment.

It must be observed that in this connection the words "*injury*" and "*accident*" are used in a popular sense.

Injury by accident.

"Injury" does not mean "injuria," *i.e.*, an actionable wrong, but physiological injury, such as a broken limb, rupture, wound, or other hurt however caused.

Accident.

"Accident" does not mean "inevitable accident." There is an "injury by accident" if a workman is hurt, whether it be by inevitable accident for which no one is to blame, or be the result of the negligence of a fellow-workman, or of the employer, or of the workman who is injured.

(*d*) Workmen's Compensation Act, 1906, s. 1.
(*e*) *Ibid.*, s. 8; *Russell* v. *Corser*, [1921] W. N. 5.
(*f*) *Ibid.*, s. 1, Sched. I.
(*g*) *Ibid.*, s. 13.

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"Accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed (*h*). And the fact that a man, by reason of his physical debility, is more likely to suffer an accident does not affect the question whether what befell him is to be regarded as an accident or not. Thus, when a workman in a very weak and emaciated condition while working in the stokehole of a ship received a heat stroke from the effect of which he died, it was held to be a death by accident (*i*). But accident does not include injury by disease alone not accompanied by any accident.

"Arising out of."

The words "arising out of" indicate the origin or cause of the accident which must be dependent on and connected with the employment, that is due to some cause or risk incidental to the employment. So where a sailor disappeared while on watch, his death was held to be due to an accident arising out of his employment (*j*). Where a cashier, whose duty it was to take large sums of money by train to a colliery, was murdered whilst so employed, it was held that the accident arose out of his employment inasmuch as his duty exposed him to this special risk which was consequently incidental to his employment (*k*). Where a workman was injured by lightning it was held to be an accident arising out of his employment, owing to the place and circumstances in which he was employed involving a greater than ordinary risk of injury by lightning (*l*). So where a teamster in the course of his employment was bitten by one of the stable cats, the accident was held to have arisen out of his employment (*m*). But where a workman was injured in the course of his employment by the tortious act of a fellow-workman **which had no relation to the employment**, the accident was held not to have arisen out of the employment (*n*).

(*h*) *Per* Lord MACNAGHTEN, *Fenton* v. *Thorley*, [1903] A. C. 443.

(*i*) *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437.

(*j*) *Owners of S.S. Swansea Vale* v. *Rice*, 27 T. L. R. 440.

(*k*) *Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689 [C. A.]; approved in *Trim Joint District School Board* v. *Kelly*, [1914] A. C. 667.

(*l*) *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32 [C. A.].

(*m*) *Rowland* v. *Wright*, 24 T. L. R. 852 [C. A.].

(*n*) *Fitzgerald* v. *Clarke & Son*, [1908] 2 K. B. 796 [C. A.].

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"In the course of."

"A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety" (*o*). So the Act applies where the accident arises on the employers' premises, but at a time when the actual employment has not commenced or after it has terminated (*p*), or during some temporary cessation of work; but does not apply when the accident occurs whilst the workman is going to, or returning from, his work.

Serious and wilful misconduct.

The fact that the accident was due to the negligence, or even to the misconduct, of the workman is no answer to his claim for compensation. If, however, the accident only results in **temporary disablement,** and was attributable to **serious and wilful misconduct,** he is not entitled to compensation (*q*). It has been held that mere disobedience to rules is not necessarily serious and wilful misconduct, even though it renders the workman liable to prosecution, and though it was such as would entitle the master to dismiss the workman without notice (*r*).

To whom the Act applies.

All persons who work under a contract of service or apprenticeship are "workmen" entitled to the benefit of the Act, except:

(a) persons **not engaged in manual labour** (such as clerks) **and earning more than £250** a year (*s*);
(b) persons whose **employment is casual** and are *not* employed in the employer's business, *e.g.*, a domestic charwoman not having a regular engagement;
(c) members of **the employer's family** dwelling in his house;
(d) **out-workers**;

(*o*) *Per* Lord LOREBURN, L.C., *Low* or *Jackson* v. *General Steam Fishing Co.*, [1909] A. C. 523, at p. 532.
(*p*) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [C. A.].
(*q*) Workmen's Compensation Act, 1906, s. 1 (2) (c).
(*r*) *Johnson* v. *Marshall, Sons & Co.*, [1906] A. C. 409.
(*s*) *Reid* v. *British and Irish Steam Packet Co., Limited*, [1921] W. N. 61.

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(e) members of a **police force ;**

(f) persons in the **naval or military service of the crown** (*t*).

Scale of compensation.

The scale of compensation and the mode of working it out is set out in detail in Schedule I. to the Act, and has been the subject of a good many decisions. The amount to which the workman is, or, in case of death, his dependants are, entitled, depends primarily on his wages. In the case of total or partial incapacity he gets a weekly sum, so long as the incapacity lasts, not exceeding half his average weekly earnings during the preceding twelve months. In the case of death his dependants get a lump sum in no case exceeding £300.

Procedure.

No action lies for compensation. If the right to compensation or the amount of compensation is disputed the matter is decided in the first instance by an arbitrator, who may be, and generally is, a county court judge. From him there is an appeal direct to the Court of Appeal. And a writ of prohibition will not lie against a county court judge sitting as arbitrator under the Act (*u*).

Alternative remedies.

When the injury is such that there is a cause of action against the employer at common law or under the Employers' Liability Act, the workman must elect whether he will proceed for compensation or bring an action. The employer cannot be compelled to pay both damages and compensation (*v*). But if he fail in his action he can still proceed under the Act, provided application for a compensation award is made either before final judgment or pending appeal, but in the latter case, if compensation is awarded, the appeal must be abandoned (*w*).

(*t*) Workmen's Compensation Act, 1906, ss. 9, 13.

(*u*) *Turner* v. *Kingsbury Collieries, Limited*, [1921] W. N. 184.

(*v*) Workmen's Compensation Act, 1906, s. 1 (2).

(*w*) *Neale* v. *Electric and Ordnance Accessories Co., Limited*, [1906] 2 K. B. 558 ; and generally, see Willis' Workmen's Compensation Act, 1906.

CANADIAN NOTES TO CHAPTER IX. OF PART II.

Article 91.

The English doctrine of "common employment" has never formed part of the law of Quebec: see *Dupont* v. *Quebec S. S. Co.* (1896), 11 Que. S. C. 188, a case of the conflict of laws.

In Saskatchewan and Alberta the defence of "common employment" has been formally abrogated by statute.

With these exceptions the Canadian law is substantially the same as the English, redress being granted in specified cases under the various Employers' Liability Acts. Where the employer has done everything possible to provide safe working conditions the employee has no remedy at common law for an injury caused by the act of a fellow servant, and can only sue under the statutes: *Koski* v. *Canadian Northern Ry. Co.* (1916), 26 Man. L. R. 214; 34 W. L. R. 146; 27 D. L. R. 473.

Where the employer chooses to neglect statutory precautions his liability is defined as follows by Anglin, J.:—

> "If a defendant, who is required by statute to provide certain means of protection, has chosen to substitute for them other means, however effective when properly carried out, but which have failed to afford protection owing to negligence of the person employed to carry them out, and if it be found on sufficient evidence that had the statute been obeyed the injury complained of would not have been sustained, the defendant's position is that of a man from whose failure to discharge an absolute statutory duty injury has resulted. He substitutes means other than those provided by the statute entirely at his own peril, and if he would discharge himself from liability he must see to it that the protection thus provided proves efficacious. He takes the risk of all injuries which observance of the statute would probably have prevented": *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S. C. R. 494, at 532.

An employer incurs liability if he sends a man to do work for which by reason of inexperience or otherwise the man is personally unfitted. Thus in *National Trust Co. v. McLeod* (1921), 61 D. L. R. 130 the defendants sent an inexperienced workman to dig gravel from a pit which was dangerous to a man who did not know its dangers. Although the danger was unknown to the employers it was held that they were liable.

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The principle of workmen's compensation, by which an employer is bound to compensate workmen for their injuries irrespective of any fault on his own part, has been adopted by all the provinces. The Quebec law is modelled on the French *Code des Accidents du Travail*, while the other provinces follow the English model. Ontario has now adopted a provincial scheme of accident insurance, under which disputes are settled by special arbitration tribunals.

CHAPTER X.

OF PRIVATE INJURY FROM PUBLIC NUISANCES.

Meaning of "public nuisance" and "private nuisance"

THE term "nuisance" is used to include two distinct causes of action. A **public nuisance** is an infringement of a public right and an injury to the public, for which the proper remedy is either criminal proceedings or an information by the Attorney-General on the part of the public, asking for an injunction to restrain the continuance of the public nuisance. It is only when there is some **special injury to an individual** that it is the subject of an action for damages.

A *private nuisance*, on the other hand, is some injury to the property of an individual. It is not an injury to the public.

In some cases, however, the line between public and private nuisance is rather fine. Thus, such an act as carrying on a noisy trade, or emitting foul gases, though usually only a private nuisance, may amount to a public nuisance if, by reason of the injury done to the neighbourhood, it interferes with the comfort and enjoyment of the public generally, or at least of all who come within range of it (*a*).

ART. 95.—*Description of Public Nuisances.*

(1) A public nuisance is some unlawful act, or omission to discharge some legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the public are obstructed in the exercise of some common right.

(*a*) See *Soltau* v. *De Held*, 2 Sim. (N.S.) 133.

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(2) No action can be brought for a public nuisance by a private person unless he has suffered some substantial particular damage beyond that suffered by the public generally.

Kinds of public nuisances.

Public nuisances consist not only of those acts or omissions which interfere with definite public rights, such as the right of the public to use a highway, but also of nuisances which endanger the health, safety, or comfort of the public generally.

So, where a sanitary authority so manage their sewers as to affect the health or comfort of the public or the inhabitants of a large district, they commit a public nuisance in respect of which the Attorney-General is the proper party to take proceedings (*b*). As also does a person who allows rubbish or filth to be deposited on his land so as to be injurious to the inhabitants of the neighbourhood (*c*).

Nuisances to highways.

Nuisances to highways consist in any obstruction of the highway, or anything which renders the use of the highway unsafe or incommodious for the public, as physically stopping it up, or making excavations on, or immediately adjoining, it, or maintaining ruinous fences or buildings immediately adjoining it.

Examples. Excavations.

(1) Thus, where a man makes an excavation adjoining a highway, and keeps it unfenced, he commits a public nuisance and is liable for any injury occasioned to a person falling into it (*d*).

(2) So, also, traders who keep vans in a street for an unreasonable time for the purpose of loading and unloading, cause an unreasonable obstruction which may amount to a public nuisance (*e*).

Ruinous premises.

(3) To permit premises adjoining a highway to fall into a ruinous condition is a public nuisance entitling a person

(*b*) See *Att.-Gen.* v. *Luton Local Board*, 2 Jur. (N.S.) 180; *Att.-Gen.* v. *Birmingham Town Council*, 6 W. R. 811; *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*c*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*d*) *Barnes* v. *Ward*, 9 C. B. 392.

(*e*) *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276 [C. A.].

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injured thereby to damages. Thus, where the defendant had a heavy lamp projecting over the highway, which by reason of want of repair fell on the plaintiff and injured her, it was held that the defendant was liable (*f*). But if the injury is sustained by an invitee who is not on the highway but on the defendant's premises at the time he is injured, the defendant is only liable if he knew or ought to have known of the defective condition which gave rise to the injury (*g*).

Dangerous fences.

(4) So also, a person who maintained a low spiked wall immediately adjoining a highway was held liable for injuries caused to a little girl who stumbled against the spikes whilst using the highway (*h*). And, similarly, where a boy attempted wrongfully to climb a rotten fence adjoining a highway, and the fence fell upon and injured him, he was held to be entitled to recover, because the fence was a nuisance, and he only did what might have been expected of a boy (*i*).

Excavations not adjacent to roads.

(5) An excavation on land not so near to a highway as to be dangerous to persons lawfully using the highway is not a nuisance, and a trespasser has no right of action if he falls into it (*j*)

Justification of nuisances.

(6) A public nuisance may be authorised by statute (*k*), but the right to do what amounts to a public nuisance cannot be acquired by prescription or long user, or justified on the ground that it is in some respects a convenience to the public (*l*). So the mere fact that a nuisance to a highway has existed for a long time is no defence. In order to justify, it must be shown to have existed at the time when the highway was dedicated to the public, so that it may be inferred that the highway was dedicated subject thereto. Thus, a highway may be dedicated subject to the right to plough it up at intervals (*m*), or to hold markets or fairs on

(*f*) *Tarry* v. *Ashton*, 1 Q. B. D. 314.
(*g*) *Pritchard* v. *Peto*, [1917] 2 K. B. 173.
(*h*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199.
(*i*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.].
(*j*) See *Hounsell* v. *Smyth*, 7 C. B. [N.S.] 731.
(*k*) *R.* v. *Pease*, 4 B. & Ad. 30, *ante*, Art. 10.
(*l*) *R.* v. *Train*, 2 B. & S. 640; *R.* v. *Ward*, 4 A. & E. 384.
(*m*) *Arnold* v. *Blaker*, L. R. 6 Q. B. 433 [Ex. Ch.].

Art. 95. it (*n*), or to the right of an adjoining owner to maintain in the footway a cellar flap or grating (*o*). But after the public have acquired the highway, no right to do these things can be gained except by statute.

ART. 96.—*Public Nuisance only Actionable in respect of Particular Damage.*

To enable a private person to bring an action for damages in respect of a public nuisance, he must prove either—

(a) That he has suffered some substantial damage peculiar to himself in his person or trade or calling, and different in kind from the damage suffered by the public; or

(b) That the public nuisance is also an interference with some private right or property of his.

Comment. The damage to fall within the first part of this rule must be different in kind, and not merely in degree, from that suffered by the public generally. Thus obstructing a highway is a public nuisance. A person who is merely prevented from using the highway suffers only the same damage as any other member of the public (*p*). But a person who in using the highway suffers *personal injuries* by reason of the obstruction, suffers damage peculiar to himself, and in respect thereof has a right of action (*q*).

So, too, has a person whose business is interfered with by reason of customers being deterred from getting to

(*n*) *Elwood* v. *Bullock*, 6 Q. B. 383; *Att.-Gen.* v. *Horner*, 11 App. Cas. 66.

(*o*) *Fisher* v. *Prowse*, 2 B. & S. 770; *Robbins* v. *Jones*, 15 C. B. (N.S.) 221.

(*p*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316.

(*q*) *Barnes* v. *Ward*, 9 C. B. 392.

his shop (*r*), or by reason of his business premises being rendered dark or less commodious (*s*). **Art. 96.**

Again, an obstruction to a highway may also be an interference with some private right, or some property of the plaintiff, so that in that way also he suffers damage of a kind peculiar to himself. The right of access to a highway from adjoining property is a private right quite distinct from the public right of using the highway, and accordingly an obstruction which cuts off access to a highway is actionable as causing particular damage (*t*).

Any person may abate a public nuisance by which he is obstructed in the exercise of a public right by removing the obstruction so far as is reasonably necessary to enable him to exercise the right interfered with; but he cannot do more than this. So, if there is an obstruction in a highway, a person using the highway may *only interfere with it as far as is necessary to exercise his right of passing along the highway*, and if there is room to pass by without removing the obstruction, he has no right to interfere with it (*u*), and may be liable to the owner if he damages the property by interfering with it (*v*). Abatement.

ART. 97.—*Liability of Owner or Occupier for Public Nuisances.*

(1) If a person is injured by reason of a public nuisance caused by the want of repair or condition of premises adjoining a highway, the occupier is *primâ facie* liable and not the owner (unless he is also the occupier) (*w*). In particular

(*r*) *Fritz* v. *Hobson*, 14 Ch. D. 542; *Lyons* v. *Gulliver*, [1914] 1 Ch. 631.

(*s*) *Benjamin* v. *Storr*, L. R. 9 C. P. 400.

(*t*) *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

(*u*) *Dimes* v. *Petley*, 15 Q. B., 276; *Davies* v. *Mann*, 10 M. & W. 546.

(*v*) *Hope* v. *Osborne*, [1913] 2 Ch. 349; *Mills* v. *Brooker*, [1919] 1 K. B. 555.

(*w*) *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311. But see *Pritchard* v. *Peto*, [1917] 2 K. B. 173.

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the owner is *not* liable if he lets the premises to a tenant who agrees to repair them, unless he knows of the nuisance at the time of the letting and does something which amounts to an authority to continue it (*x*).

(2) The **owner is liable** (i) if he has contracted with the tenant to repair and the nuisance is due to want of repair (*y*); (ii) if he has let the premises in a ruinous condition and the tenant has not agreed to repair (*z*).

(3) Where the premises are in the occupation of a tenant **from year to year** there is, in effect, reletting each year, and (unless the tenant has agreed to repair) the landlord is liable for damage caused by a nuisance, if since the creation of the nuisance and before the damage he might have determined the tenancy and did not, for in that case he "lets the premises in a ruinous condition" (*a*).

(4) When premises are let on a **weekly tenancy** there is not a reletting at the end of each week so as to make the landlord liable for nuisances arising since the original letting, unless he has contracted with the tenant to do repairs. For such nuisances the tenant and not the landlord is liable (*b*).

Comment.

The principle is that the occupier is *primâ facie* liable. An owner not in occupation is only liable if he has in some

(*x*) *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658; *Harris* v. *James* (1876), 45 L. J. Q. B. 545.

(*y*) *Payne* v. *Rogers*, 2 H. Bl. 350; *Broggi* v. *Robbins* (1898), 14 T. L. R. 439.

(*z*) *Gandy* v. *Jubber*, 5 B. & S. 78; but see Pollock on Torts, 11th ed., p. 436, note (*g*).

(*a*) *Ibid.*

(*b*) *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

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way authorised the continuance of the nuisance. He may authorise the continuance of the nuisance if, knowing of its existence, he lets the premises without repairing or requiring the tenant to repair, or if he keeps control of the premises by undertaking to repair them himself (*c*).

So, too, the owner and occupier of vacant land is liable if he knows it is being so used by the public as to become a public nuisance, and does not take reasonable steps to prevent such a user, even though he may not himself have actively done anything to cause the nuisance (*d*).

But neither owner nor occupier is liable for a nuisance created by some third person without his knowledge and which he could not by reasonable care have prevented (*e*).

Illustrations.

(1) The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured:—*Held*, that the obligation to repair being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And KEATING, J., said: "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises; that might be a circumstance to show that he authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair" (*f*).

(2) A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot, and for letting light into the lower part of the premises adjoining. The premises were at the time under lease to a tenant who

(*c*) *Gandy* v. *Jubber*, *supra*.

(*d*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*e*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

(*f*) *Pretty* v. *Bickmore*, L. R. 8 C. P. 401, and see *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311.

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covenanted to repair. At the time of the demise the grating was insecure, but there was no evidence that the landlady had any knowledge of its unsafe state, and the jury found she was not to blame:—*Held*, that as the premises were demised, and there was no longer any obligation on the landlord to keep them in repair, the plaintiff had no cause of action against the landlady. It was intimated that if the landlady had, at the time of the demise, known of the defect and done nothing to remedy it, she might have been liable as well as the tenant (*g*).

Liability of landlord to tenant.

(3) The above rules only apply to nuisances (*h*). They have no application as between landlord and tenant, or landlord and the guests of a tenant. Apart from contract, a landlord is not bound to keep the demised premises in repair as regards either his tenant (*i*), or the guests of his tenant (*j*). But a landlord who retains portions of buildings the other portions of which are let to different tenants, if the portions he retains are not used by the tenants his liability to keep these portions in repair is absolute (*jj*). Where the portions retained by the landlord are used by the tenants and their guests the liability of the landlord (apart from contract and statute) is merely the duty he has towards licensees—to warn of any concealed danger of which he knows, *i.e.*, not to make a trap (*k*). As to premises let subject to the provisions of the House and Town Planning Act, 1909, ss. 14 and 15, the implied obligation to repair is in favour of the tenant *alone*, not for the benefit of his wife (*l*) or daughter (*m*), but to a claim of the tenant himself for damage suffered from non-fulfilment of the statutory obligation to repair it is no answer that the danger was obvious (*n*).

(*g*) *Gwinnel* v. *Eamer*, L. R. 10 C. P. 658.
(*h*) As to private nuisances, see *post*.
(*i*) *Keates* v. *Cadogan*, 20 L. J. C. P. 76.
(*j*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.].
(*jj*) *Hart* v. *Rogers* (1915), 32 T. L. R. 150.
(*k*) *Huggett* v. *Miers*, [1908] 2 K. B. 278; *Lucy* v. *Bawden*, [1914] 2 K. B. 318.
(*l*) *Middleton* v. *Hall* (1913), 108 L. T. 804.
(*m*) *Ryall* v. *Kidwell & Son*, [1914] 3 K. B. 135.
(*n*) *Dunster* v. *Hollis*, [1918] 2 K. B. 795.

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(4) When some boys broke the railings of an area of a vacant house, so that the area was a danger to persons using the street, it was held that the owner was not liable as he did not know of the broken railing and had used reasonable care to prevent the railings becoming a nuisance. An area is not a thing a man keeps at his peril (*o*).

(*o*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

CANADIAN NOTES TO CHAPTER X. OF PART II.

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In *Halifax Street Ry. Co.* v. *Joyce* (1893), 22 S. C. R. 258, the defendant company obstructed a highway by permitting street car tracks to project above the level of the road, with the result that the plaintiff's horse suffered injury. It was held that the company was liable to the plaintiff.

Works undertaken under statutory authority may be an actionable nuisance, if it is possible for them to be operated inoffensively: *Chadwick* v. *City of Toronto* (1914), 32 Ont. L. R. 111.

In *Cahill and Co.* v. *Strand Theatre Co.* (1920), 53 N. S. R. 514, the Supreme Court of Nova Scotia followed the dubious English decision in *Lyons* v. *Gulliver* (1914), 1 Ch. 631, and held a theatre-owner responsible for the queue which collected in the street awaiting admission to the performance. I would respectfully submit that in these cases the dissenting opinion of Phillimore, L.J., in the English Court of Appeal is based upon sounder legal reasoning than the decision of the majority.

A wharf unlawfully constructed in a navigable stream is a public nuisance which gives a right of action to any person suffering special damage: *Arsenault* v. *The King* (1916), 16 Ex. R. 271; 32 D. L. R. 622.

Persons who undertake the responsibility of abating a nuisance should be careful to keep their feelings under control. In *Lorraine* v. *Norrie* (1912), 46 N. S. R. 177; 6 D. L. R. 122, the plaintiff and his men set out to destroy an obstruction in the river erected by the defendant. The defendant resisted their action and appears to have struck the first blow, whereupon the plaintiff's men held him down and beat him severely. The court held that the plaintiff was liable in damages.

Similarly it has been held that a private individual is a trespasser if he destroys an obstruction on the highway which does not interfere with his passage and causes him

no special damage: *Waddell* v. *Richardson* (1912), 17 B. C. R. 19.

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In *Love* v. *Machray* (1912), 22 Man. L. R. 52; 20 W. L. R. 505; 1 D. L. R. 674, the plaintiff's horse was pastured, by agreement with the tenant on land leased by the defendant to a tenant. The animal fell down an open well, and the plaintiff sued the owner in reliance on a municipal by-law which required the "owner or occupant" to fence all wells. The court held that the word "owner" must be interpreted as meaning "owner in occupation," and that the defendant could not be held liable, since he retained no control or right of entry to the premises.

CHAPTER XI.

PRIVATE NUISANCES.

SECTION I.—NUISANCE TO CORPOREAL HEREDITAMENTS.

ART. 98.—*General Liability.*

(1) A private nuisance is some unauthorised user of a man's own property causing damage to the property of another, or some unauthorised interference with the property of another, causing damage (*a*).

(2) Any private nuisance whereby sensible injury is caused to the property of another, or whereby the ordinary physical comfort of human existence in such property is **materially** interfered with, is actionable.

(3) Liability for nuisance is independent of negligence.

(4) No use of property which would be legal if due to a proper motive, can be a nuisance merely because it is prompted by a motive which is improper or even malicious (*b*).

Comment.

The law with regard to private nuisances mainly depends upon the maxim *sic utere tuo ut alienum non lædas*. Not that that maxim can receive a literal interpretation, for a man may do many acts which may injure others (*ex. gr.*, build a house which may shut out a fine view theretofore enjoyed by a neighbour except where a right to such view

(*a*) *Stearn* v. *Prentice Brothers*, [1919] 1 K. B. 394.
(*b*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

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is reserved by covenant (*c*) ; but such acts are necessarily incidental to the ownership of property. The acts referred to in the maxim are acts which go beyond the recognised legal rights of a proprietor.

Lawful act done with malicious motive.

The owner of land containing underground water which percolates by undefined channels, and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land, so as to deprive his neighbour of it (*d*). An owner diverted underground water percolating in undefined channels, not to improve his own land, but maliciously in order to injure his neighbours by depriving them of their water supply and to compel them to buy him out. This unneighbourly conduct, however, was held to be lawful, because it was an act rightful in itself, and therefore not wrongful when done maliciously (*e*).

Illustrations.

Fumes.

(1) In the leading case of *Tipping* v. *St. Helen's Smelting Co.* (*f*), the fact that the fumes from the company's works killed the plaintiff's shrubs was held sufficient to support the action ; for the killing of the shrubs was an injury to the property.

Noisy and noisome trades.

(2) So, too, it was said, in *Crump* v. *Lambert* (*g*), that smoke, unaccompanied with noise or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance ; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence in the plaintiff's property (*h*).

Interference with enjoyment of property.

(3) Where the alleged nuisance consists of acts which interfere with the reasonable enjoyment of property, the inconvenience must be substantial. The standard is referred to in *Bland* v. *Yates* as "a serious inconvenience and interference with the comfort of the occupiers of the

(*c*) *Browne* v. *Flower*, [1911] 1 Ch. 219.
(*d*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349.
(*e*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.
(*f*) L. R. 1 Ch. 66 ; *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47.
(*g*) L. R. 3 Eq. 409.
(*h*) *Bland* v. *Yates*, 58 Sol. Jo. 612.

dwelling-house according to notions prevalent among reasonable English men and women." **Art. 98.**

(4) The collection of a crowd of noisy and disorderly people outside grounds in which entertainments with music and fireworks are being given for profit may constitute a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*i*). Noisy entertainments.

So, too, may the collection of large and noisy crowds outside a club kept open till 3 A.M. for pugilistic encounters (*j*).

(5) So, too, the turning of the ground floor of a London house into a stable, so that the neighbours are disturbed all night by the noises of the horses, may constitute a nuisance (*k*).

(6) Other examples of nuisances to corporeal hereditaments are, permitting buildings to become ruinous so as to fall on one's neighbour's land (*l*); overhanging eaves from which the water flows on to another's property (*m*); or overhanging trees (*n*); or pigsties creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are a nuisance if serious discomfort is caused (*o*). So, also, is a small-pox hospital so conducted as to spread infection to neighbouring houses (*p*). The ringing of bells at a Roman Catholic chapel adjoining plaintiff's premises at all hours of the day and night (*q*), and the collecting a queue so that the entrance to plaintiff's premises was interfered with, are other examples (*r*). Other examples.

(*i*) *Walker* v. *Brewster*, L. R. 5 Eq. 25. See also *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington*, L. R. 4 Ch. 388.

(*j*) *Bellamy* v. *Wells*, 60 L. J. Ch. 156. And see also *Barber* v. *Penley*, [1893] 2 Ch. 447, and *Jenkins* v. *Jackson*, 40 Ch. D. 71.

(*k*) *Ball* v. *Ray*, L. R. 8 Ch. 467.

(*l*) *Todd* v. *Flight*, 9 C.B. (N.S.) 377.

(*m*) *Bathishill* v. *Reed*, 25 L. J. C. P. 290.

(*n*) *Lemmon* v. *Webb*, [1895] A. C. 1; *Smith* v. *Giddy*, [1904] 2 K. B. 448.

(*o*) *Street* v. *Tugwell*, Selwyn's Nisi Prius, 13th ed., 1070.

(*p*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193.

(*q*) *Soltau* v. *de Held* (1851), 21 L. J. Ch. 153.

(*r*) *Lyons* v. *Gulliver*, [1914] 1 Ch. 631.

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ART. 99.—*Reasonableness of Place.*

(1) That which is *primâ facie* a nuisance cannot be justified by the fact that it is done in a proper and convenient place and is a reasonable use of the defendant's land (*s*).

(2) Where the acts complained of are nuisances by reason of **injury to property**, it is no defence that the locality is one devoted to trades which cause such injury (*t*).

(3) But with regard to acts which are nuisances by reason of their interfering with the **enjoyment of property**, as distinguished from those which damage the property itself, the circumstances of the locality must be taken into consideration (*u*).

Comment.

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it. Thus, where the defendant used his land for burning bricks and so caused substantial annoyance to his neighbour, it was held that it was no defence that it was done in a proper and convenient spot, and was a reasonable use of the land (*s*). At the same time a person is entitled to use his land or house in the ordinary way in which property of the like character is

(*s*) *Bamford* v. *Turnley*, 31 L. J. Q. B. 286 [Ex. Ch.].

(*t*) *St. Helen's Smelting Co.*, v. *Tipping*, 11 H. L. Cas. 642; *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47.

(*u*) *Ibid.* and *Polsue and Alfieri, Limited* v. *Rushmer*, [1907] A. C. 121; *Bland* v. *Yates*, 58 Sol. Jo. 612; *De Keyser's Hotel, Limited* v. *Spicer* (1914), 30 T. L. R. 257; and note the decision on requisitioning hotels (*Att.-Gen.* v. *De Keyser's Hotel, Limited*, 89 L. J. Ch. 417).

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used, and an adjacent owner must put up with such noises and inconveniences as may reasonably be expected from his neighbours, such as the noise of a pianoforte, or the noise of children in their nursery, which are noises we must reasonably expect, and must, to a large extent, put up with (*v*).

(2) In *St. Helen's Smelting Co.* v. *Tipping* (*w*), Lord WESTBURY said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces **material injury to the property,** and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of **sensible personal discomfort.** With regard to the latter—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from

(*v*) See *Ball* v. *Ray*, L. R. 8 Ch. 467; *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685.

(*w*) 11 H. L. Cas. 650.

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persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

(3) In a recent case (*x*), WARRINGTON, J., said that for the purpose of coming to a decision whether working a noisy printing machine by night in Gough Square (a neighbourhood devoted to the printing trade) was a nuisance to a residence adjoining the square, he was to look not at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular with regard to the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations; but that if, after taking these circumstances into consideration, he found a serious and not merely a slight interference with the plaintiff's comfort, he thought it his duty to interfere. And acting on this principle, he granted an injunction restraining the defendants from using their machine, although the machine was one of an improved type, quieter than those generally used, and was properly used. It was enough that in fact it created a nuisance. His decision was affirmed in the House of Lords.

ART. 100.—*Plaintiff coming to the Nuisance.*

It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance, and yet went and lived near it (*y*).

Or in the words of BYLES, J., in *Hole* v. *Barlow* (*z*): "It used to be thought that if a man knew that there was a

(*x*) *Rushmer* v. *Polsue and Alfieri, Limited*, 21 T. L. R. 183, affirmed in House of Lords, [1907] A. C. 121; more recently the same judge has decided on the same principles *Bland* v. *Yates* (1914), 58 Sol. Jo. 612; *De Keyser's Hotels, Limited* v. *Spicer Brothers* (1914), 30 T. L. R. 257.

(*y*) *St. Helen's Smelting Co.* v. *Tipping, supra.*

(*z*) 27 L. J. C. P. 207, at p. 208.

nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house. Art. 100.

So where a confectioner had for many years used a pestle and mortar in his kitchen in Wigmore Street, and then the plaintiff, a physician in Wimpole Street, built a consulting room in his back garden against the confectioner's kitchen, and the noise from the pestle and mortar was a nuisance to the consulting room, it was held that, although the plaintiff had come to the nuisance, he was nevertheless entitled to complain of it as a nuisance. But the right to commit a nuisance may be acquired by having committed the nuisance complained of for upwards of twenty years, not merely the cause but the nuisance must have been committed for that period (*a*). Illustration.

ART. 101.—*Liability of Occupier and Owner for Nuisances.*

(1) The occupier of premises upon which a nuisance is created to adjoining property is *primâ facie* liable. There is no liability upon an owner as such (*b*).

(2) An owner who is not in occupation may be liable if he has originally created the nuisance and let the premises with the nuisance complained of, or, when the nuisance is due to want of repair, has permitted the premises to

(*a*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.]; and see *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478. As to the effect of an established business being declared by subsequent statute to have been an "offensive trade," see *Mayo* v. *Stazicker*, [1921] W.N. 64.

(*b*) *Russell* v. *Shenton*, 3 Q. B. 449.

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get out of repair, and lets them with knowledge of the want of repair, if, as between himself and his tenant, he has undertaken the repairs (*c*).

(3) Where the nuisance is caused, not by the state of the premises themselves, but by their user, an owner who is not in occupation is not liable for the nuisance, although he has let the premises in such a condition that they are capable of being so used as to cause a nuisance (*d*).

Comment.

(1) Generally the person who causes or authorises the nuisance is liable, so a person who creates a nuisance on his land and then lets it with the nuisance, is liable if the nuisance is continued (*e*). And the purchaser or lessee also may be liable for continuing the nuisance (*f*).

So, too, an owner of land who lets a house and undertakes, as between himself and his tenant, to repair, is liable if, by reason of his not repairing, a nuisance is caused to adjoining premises (*g*). But an owner who is not occupier is not liable unless he can be fixed with liability in one of these ways (*h*).

Nuisances caused by user of land.

(2) If a person builds a factory with a chimney on his land, and lets the land, he does not thereby authorise the user of the chimney so as to be a nuisance. It is not the existence of the chimney which is a nuisance, but its use, and for this the person who uses the chimney, not the owner of the land, is liable (*i*). So, also, if a third person against my will puts something on my land which is a nuisance to my neighbour, I am not liable, for I have not caused the nuisance (*j*).

(*c*) *Rosewell* v. *Prior*, 2 Salk. 460; *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

(*d*) *Rich* v. *Basterfield*, 4 C. B. 783.

(*e*) *Rosewell* v. *Prior*, 2 Salk. 460.

(*f*) *Penruddock's Case*, 5 Co. Rep. 100 b.

(*g*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

(*h*) *Russell* v. *Shenton*, 3 Q. B. 449.

(*i*) *Rich* v. *Basterfield*, *supra*.

(*j*) *Saxby* v. *Manchester and Sheffield Rail. Co.*, L. R. 4 C. P. 198.

ART. 102.—*Prescription to Commit a Nuisance.* Art. 102.

The right to commit a private nuisance may be acquired by grant or prescription.

NOTE.—An owner of land may by express grant give to another a right to do that which would otherwise be a nuisance, *e.g.*, to discharge foul water on to his land. If a person has been actually committing a nuisance for a great many years without objection, it is reasonable to presume that he has in some way acquired a right to do so, and at common law juries were directed to **presume a lost grant** in such cases. But juries were not bound to, and in some cases refused to, presume a lost grant which they did not believe ever existed in fact (*k*).

The right of one owner of land to commit nuisances of this kind in respect of the land of another is a right in the nature of an easement, being not a mere personal right, but a right granted, or presumed to have been granted, by the owner of land or his predecessors in title (so as to bind all subsequent owners), to the owner of the land for whose benefit it is created for the benefit of him and all subsequent owners.

Prescription Act.

Now, by the Prescription Act, 1832, it is seldom necessary to presume a lost grant, for where an easement which might at common law be claimed by lost grant has been actually enjoyed by a person claiming it as a right without interruption for **twenty years immediately before action** brought, that is generally enough to establish the right, unless it has been enjoyed by consent or agreement (*l*).

(*k*) The law as it stood before the Prescription Act "put an intolerable strain on the consciences of judges and jurymen" (*per* Lord MACNAGHTEN in *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, at p. 236).

(*l*) 2 & 3 Will. 4, c. 71. The period is in some cases forty years, as when the land of the servient tenement (that is the land whose owner is supposed to have made the grant) has been owned by some person who could not lawfully make a grant to bind his successors in title, such as a tenant for life. If there has been forty years' enjoyment the right can only be defeated by showing that it was enjoyed under an express grant or consent in writing. No grant can now be presumed from enjoyment for a less period than twenty years.

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Illustrations.

(1) Accordingly, now a person may by twenty years' user gain a right to pour foul water into another's stream (*m*).

(2) It must be noted that the period of twenty years only begins to run from the time when the acts complained of begin to be a nuisance. So when the defendant had for more than twenty years made a noise which did not amount to an actionable nuisance to his neighbour, because the neighbour's land was not built on, he acquired no easement by so doing; and accordingly when the plaintiff built a consultation room on the land affected by the noise, and the noise then began to be a nuisance, it was held that the defendant had not acquired a right under the Prescription Act (*n*).

(3) A person can only acquire by prescription a right to do acts of the same kind and amount as he has used for the period of enjoyment. So if he has for twenty years poured a certain amount of filth of a particular kind into a stream, he can only prescribe to discharge filth of that amount and of that kind, and is not justified in pouring in any larger amount, or filth of a different kind (*o*).

ART. 103.—*Remedy of Reversioners for Nuisances.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*p*).

Illustrations.

(1) Any **permanent** obstruction of an incorporeal right, as of way, air, light, water, etc., may be an injury to the reversion (*q*).

(*m*) *Wright* v. *Williams*, 1 M. & W. 77; and see *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229.

(*n*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.].

(*o*) *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478.

(*p*) *Bedingfield* v. *Onslow*, 3 Lev. 209.

(*q*) *Kidgill* v. *Moor*, 9 C. B. 364; *Metropolitan Association* v. *Petch*, 27 L. J. C. P. 330; *Greenslade* v. *Halliday*, 6 Bing. 379.

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(2) But an action will not lie for a nuisance of a mere transient and temporary character (*r*). Thus, a nuisance arising from noise or smoke will not support an action by the reversioner (*s*). Some injury to the reversion must always be proved, for the law will not assume it (*t*).

ART. 104.—*Remedy by Abatement.*

(1) A person injured by a nuisance may abate it, that is remove that which causes the nuisance, provided that he commits no riot in the doing of it, nor occasions any damage beyond what the removal of the inconvenience necessarily requires (*u*).

(2) Where there are alternative ways of abating a nuisance the less mischievous must be chosen (*v*).

(3) A person cannot justify doing a wrong to an innocent third party or to the public in abating a nuisance. So it seems that entry on the lands of an innocent third party cannot be justified (*w*).

(4) In order to abate a nuisance an entry may be made on the lands on which the cause of the nuisance is, provided notice requesting removal of the nuisance be first given. But if a nuisance can be abated without committing a trespass no notice is required (*x*).

(*r*) *Baxter* v. *Taylor*, 4 B. & Ad. 72.

(*s*) *Mumford* v. *Oxford, Worcester and Wolverhampton Rail. Co.*, 25 L. J. Ex. 265; *Simpson* v. *Savage*, 26 L. J. C. P. 50.

(*t*) *Kidgill* v. *Moor*, 9 C. B. 364.

(*u*) Stephen's Commentaries, Bk. V., Chap. I. (15th ed., Vol. III., p. 284). It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

(*v*) *Per* BLACKBURN, J., in *Roberts* v. *Rose*, L. R. 1 Ex. 82 [Ex. Ch.], at p. 89.

(*w*) *Ibid.*

(*x*) *Lemmon* v. *Webb*, [1895] A. C. 1.

Art. 104. (5) An entry on another's land to prevent an apprehended nuisance cannot be justified.

Notice.

It must be observed that notice is generally necessary before entry on the lands of another—but it seems that notice is dispensed with in three cases, viz., (a) where the owner of the land was the original wrongdoer, by placing the nuisance there; (b) where the nuisance arises by default in performance of some duty cast on him by law; and (c) when the nuisance is immediately dangerous to life or health (*y*).

Examples.

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may, after notice and request to him to remove it, enter and pull it down (*z*); but where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*a*). But even after notice abatement cannot be justified in cases where an injunction would not be granted (*b*).

(2) Branches of trees overhanging a man's land may be cut to abate the nuisance without notice, provided this can be done without committing a trespass (*c*).

Pulling down inhabited house.

(3) A commoner may abate an encroachment on his common by pulling down a house or a fence obstructing his right (*d*); so also may one whose right of way is obstructed (*e*); before pulling down a house, notice and request to remove must be given *if the house is actually inhabited* (*f*).

(*y*) See *Jones* v. *Williams*, 11 M. & W. 176.
(*z*) *R.* v. *Rosewell*, 2 Salk. 459.
(*a*) *Norris* v. *Baker*, 1 Roll. Rep. 393, fol. 15.
(*b*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.
(*c*) *Lemmon* v. *Webb*, [1895] A. C. 1.
(*d*) *Mason* v. *Cæsar*, 2 Mod. Rep. 65.
(*e*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.
(*f*) *Davies* v. *Williams*, 16 Q. B. 556; *Lane* v. *Capsey*, [1891] 3 Ch. 411.

SECTION II.—NUISANCES TO INCORPOREAL HEREDITAMENTS.

Servitudes.

A servitude is a duty or service which is owed in respect of one piece of land, either to the owner as such of another piece of land, or to some other person. Property to which such a right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Where the right is annexed to a dominant tenement it is said to be **appurtenant** if it arises by prescription or grant, and **appendant** if it arises by manorial custom. Where it is annexed merely to a person it is said to be a **right in gross.**

Natural servitudes.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription, or express or implied grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre in alieno solo*, according as the right is merely a right of user, or a right to enter another's land and take something from it, as game, fish, minerals, gravel, turf, or the like.

Easements and *profit à prendre.*

The easements known to our law are numerous. Mr. Gale, in his excellent treatise on Easements, gives a list of no less than twenty-five "amongst other" instances. Any unjustifiable interference with an easement or other servitude is a tort, and torts of this kind are usually classed with nuisances. As the rights interfered with are incorporeal hereditaments, they are spoken of as nuisances to incorporeal hereditaments. Torts of this kind are as various as are the kinds of easements and other servitudes, but in an elementary work such as this, it is only possible to treat of those which most often occur in practice, namely, interferences with: (1) rights of support for land,

(2) rights of support for buildings, (3) rights to the free access of light and air, (4) rights to the use of water, and (5) rights of way. And as to these, it is only proposed to deal with the nature of the rights sufficiently to enable the student to appreciate what kind of acts amount to disturbances. The law relating to the acquisition of servitudes and their incidents belongs rather to the law of property than to that of torts.

Franchises.

Another kind of incorporeal right is a franchise, and a disturbance of that right is a nuisance. Franchises include rights of ferry and market. Other rights akin to franchises are patent rights, copyrights, and rights to trade marks; the nature and acquisition of which depend largely upon the several statutes relating thereto. The right to vote for members of Parliament is also a franchise, and an action lies for preventing a person from exercising that right (*g*).

Disturbances or interferences with *profits à prendre* (such as rights of common and fisheries) and of franchises (such as ferries and markets) are torts, and are properly included among nuisances to incorporeal hereditaments. But the nature of these rights and what acts amount in law to disturbances belongs rather to the law of property than to that of torts, and cannot be conveniently discussed in an elementary work on torts.

ART. 105.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of mineral matter necessary to retain such neighbour's land in its natural and unencumbered state (*h*).

(2) A man may not pump from under his own land a bed of wet sand so as to deprive his

(*g*) *Ashby* v. *White*, 2 Lord Raym. 938; 1 Sm. L. C. 240.

(*h*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284 [C. A.]; *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.*, [1913] A. C. 11.

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neighbour's land of support (*i*); but he may pump water from under his own land with impunity, although the result may be to deprive his neighbour's land of support (*k*).

(3) In order to maintain an action for disturbance of this right, some appreciable subsidence must be shown (*l*), or, where an injunction is claimed, some irreparable damage must be threatened (*m*).

(4) The right of support may be destroyed by covenant, grant or reservation (*n*).

Illustrations. The right arises *ex jure naturæ*.

(1) In *Humphries* v. *Brogden* (*o*), Lord CAMPBELL said: "The right to *lateral* support from adjoining soil is not, like the support of one building from another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione* where there are separate freeholds from the surface of the land and the mines belong to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these

(*i*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217 [C. A.].

(*k*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; but see *per* LINDLEY, M.R., in *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch., at p. 239.

(*l*) *Smith* v. *Thackerah*, L. R. 1 C. P. 564, as explained in *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301 [C. A.], at p. 313.

(*m*) *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284 [C. A.].

(*n*) *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; *Aspden* v. *Seddon*, L. R. 10 Ch. App. 394, and cases there cited; *Davies* v. *Powell Duffryn Steam Coal Co.*, [1921] W. N. 161 [C. A.].

(*o*) 12 Q. B. 739.

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Subterranean water.

(2) But although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there would seem to be nothing at common law to prevent him draining that soil, if for any reason it becomes necessary or convenient for him to do so. It has therefore been held that he is not liable if the result of his drainage operations is to cause a subsidence of his neighbour's land (*p*). But whatever may be true of percolating waters themselves, if a man withdraws, along with that water, quicksand or water-logged soil, and in consequence thereof his neighbour's land settles and cracks, he will be liable (*q*). And the same remark applies *a fortiori* to the withdrawal of pitch or other liquid mineral, and (it is submitted) to mineral oil (*r*).

Exception.

Companies governed by the Railways Clauses Consolidation Act, 1845, by virtue of the mining sections (ss. 77–85) do not acquire a right to support in respect of mines within 40 yards of a railway; but as to all the mines outside that limit the common-law right to lateral support for its railway is maintained unaffected (*s*).

(*p*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; but see the observations on this case made by LINDLEY, M.R., and RIGBY, L.J., in *Jordeson* v. *Sutton, etc. Gas. Co.*, [1899] 2 Ch. 217 [C. A.], at pp. 239, 243.

(*q*) The subject was discussed in *Salt Union* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822. There the defendants were held not liable for pumping brine from under their land, though the result was to remove the support of neighbouring land by dissolving the salt in the subsoil. The decision, however, turned on the special circumstances of the case, and does not support the general principle that brine may be lawfully pumped so as to remove the support of adjacent lands.

(*r*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co.* v. *Ambard*, [1899] 2 Ch. 260, and [1899] A. C. 594 [P. C.].

(*s*) *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.*, [1913] A. C. 11 (H. L.).

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ART. 106.—*Disturbance of Support of Buildings.*

(1) A tort is *not* committed by one who so deals with his own property as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has been gained by grant, express or implied (*t*), or by twenty years' uninterrupted user, peaceable, open, and without deception (*u*).

(2) But the owner of land may maintain an action for disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (*x*).

Right not *ex jure naturæ*.

(1) Thus, in *Partridge* v. *Scott* (*y*), it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect." So, again, as between adjoining houses, there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*z*).

Right acquired by twenty years' user.

(2) But a grant of a right of support for buildings is gained by uninterrupted user for twenty years, if the

(*t*) *Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 4 H. & N. 186; *North Eastern Rail. Co.* v. *Elliott*, 29 L. J. Ch. 808.

(*u*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*x*) *Brown* v. *Robins*, 4 H. & N. 186; *Stroyan* v. *Knowles*, *Hamer* v. *Same*, 6 H. & N. 454.

(*y*) *Ubi supra.* (*z*) *Chauntler* v. *Robinson*, 4 Ex. 163.

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enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the plaintiff's building (*a*).

(3) The right of support for an ancient building by adjacent buildings may be acquired by prescription in the same way as may the right of support by adjacent lands (*b*).

Where natural right to support of site infringed, the consequent damage to a modern house may be recoverable.

(4) Though no right of support for a *building* has been gained, yet if the act of the defendant would have caused the site of the building to subside without the building, the defendant will be liable, not merely for the damage done to the land, but also for the injury caused to the building. For he will have committed a wrongful act (viz., an act causing the subsidence of his neighbour's land), and will consequently be liable for all damages which might reasonably have been anticipated as the consequence of that act (*c*).

ART. 107.—*Disturbance of Right to Light and Air.*

(1) There is no right, *ex jure naturæ*, to the free passage of light to a house or building, but such a right may be acquired by (a) express or implied grant from the contiguous proprietors; (b) by reservation (express or implied) on the sale of the servient tenement; or (c) by actual enjoyment of such light for the full period of twenty years without interruption submitted to or acquiesced in for one year after the owner of the dominant tenement shall have had notice thereof, and of the person making or authorising such interruption (*d*).

(*a*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*b*) *Lemaitre* v. *Davis*, 19 Ch. D. 281.

(*c*) *Stroyan* v. *Knowles*, *Hamer* v. *Same*, 6 H. & N. 454. For an example of a proper case for an injunction to prevent such damage, see *Consett Industrial, etc. Society, Limited* v. *Consett Iron Co., Limited*, [1921] W. N. 161.

(*d*) 2 & 3 Will. 4, c. 71, ss. 3, 4.

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(2) A right to the free access of air through a particular defined channel, or through a particular aperture, may be acquired (*e*) in the same way as a right to light. But a right to the free access of air over land to land or buildings at large cannot (it seems) be acquired (*f*).

(3) Where the owner of a house has acquired a right over land to light in respect of any windows in that house, any person who builds on that land so close to those windows as to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) as to render it impossible to carry on business therein as beneficially as before, commits a tort (*g*).

Illustrations.

Implied grants of right.

(1) Implied grants of easements are generally founded on the maxim, "A man cannot derogate from his own grant." In other words, the grantor of land which is to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made (*h*).

Right gained by prescription.

(2) To gain a right by prescription under s. 3 of the Prescription Act, 1832 (*i*), there must be user without the written consent (*k*) of the owner of the servient tenement, uninterrupted for twenty years, from the time when window

(*e*) *Bass* v. *Gregory*, 25 Q. B. D. 481; *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*f*) *Webb* v. *Bird*, 13 C. B. (N.S.) 841; *Bryant* v. *Lefever*, 4 C. P. D. 172 [C. A.]; *Chastey* v. *Ackland*, [1895] 2 Ch. 389 [C. A.]; see *S. C.* [1897] A. C. 155.

(*g*) *Colls* v. *Home and Colonial Stores, Limited*, [1904] A. C. 179.

(*h*) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437.

(*i*) 2 & 3 Will. 4, c. 71.

(*k*) Verbal consent is not enough to prevent acquisition of the right (*Mallam* v. *Rose*, [1915] 2 Ch. 222).

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spaces are complete and the building is roofed in (*l*). As, however, by s. 4, nothing is to be deemed an interruption unless submitted to for a year after notice, it has been held that enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before the action was commenced, was sufficient to establish the right (*m*). However, for the purposes of commencing an action an inchoate title of nineteen years and a fraction is not sufficient, and no injunction will be granted until the twenty years have expired (*n*).

Right to access of air.

(3) Actions to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on, as a right to the access of "light and air." Most of the cases relate solely to the interference with the access of light, and it has been said that a right to the access of air over the general unlimited surface of the land of a neighbour cannot be acquired by mere enjoyment (*o*). Thus, in *Webb* v. *Bird* (*p*), it was held that the owner of an ancient windmill could not, under the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill. A similar decision was given in *Bryant* v. *Lefever* (*q*), where it was sought to restrain the defendant from building so as to obstruct the access of air to the plaintiff's chimneys. But there seems really to be no difference in principle between easements of light and of air, and a right to the uninterrupted passage of air **through a defined aperture,** such as a window used for ventilation (*r*), or a ventilating shaft (*s*), may be acquired by grant or prescription.

(*l*) *Collis* v. *Laugher*, [1894] 3 Ch. 659; and the section does not apply to doorways (*Levet* v. *Gaslight and Coke Co.*, [1919] 1 Ch. 24).

(*m*) *Flight* v. *Thomas*, 11 A. & E. 688 [Ex. Ch.].

(*n*) *Lord Battersea* v. *City of London Commissioners of Sewers*, [1895] 2 Ch. 708.

(*o*) *Per* COTTON, L.J., *Bryant* v. *Lefever*, 4 C. P. D. 172 [C. A.]. See also *Chastey* v. *Ackland*, [1895] 2 Ch. 398 [C. A.]; [1897] A. C. 155.

(*p*) 13 C. B. (N.S.) 841.

(*q*) *Supra*.

(*r*) *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*s*) *Bass* v. *Gregory*, 25 Q. B. D. 481.

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Degree of diminution giving rise to an action.

(4) Where a right to light has been acquired by express grant, the question whether any substantial infringement of the right has taken place must depend upon the construction of the grant. But where a right has been acquired by *implied grant* or under the Prescription Act, the owner of the right is entitled to prevent any person from building so close to the window in respect of which the light is acquired as to render the occupation of the house in which the window is situated uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the owner from carrying on business as beneficially as before (*t*). The sole question to be determined in deciding whether a right to light has been so far infringed as to give rise to an action is whether the obstruction is so great as to amount to a nuisance (*u*). It follows, therefore, that the use of an extraordinary amount of light for twenty years will not give rise to a right to receive that amount of light always, because the question whether an obstruction of light is so great as to be a nuisance cannot be affected by any considerations of what the light has been used for (*w*). Very generally speaking, an obstruction of the light which flows to a window will not be considered a nuisance if the light which remains can still flow to the window at an angle of forty-five degrees with the horizontal, especially if there is good light from other directions as well (*x*). And in a recent case a good illustration is given of the variation in light an obstruction may afford and the principles applicable (*y*).

ART. 108.—*Disturbance of Water Rights.*

(1) Every owner of land on the banks of a natural stream has a right *ex jure naturæ* to the ordinary use of the water which flows past his land (*e.g.*, for irrigation, feeding cattle, domestic

(*t*) *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

(*u*) *Ibid.*, *per* Lord DAVEY, at p. 204.

(*w*) *Ambler* v. *Gordon*, [1905] 1 K. B. 417.

(*x*) *Per* Lord LINDLEY in *Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 210; and see *Kine* v. *Jolly*, [1905] 1 Ch. 480 [C. A.].

(*y*) *Davis* v. *Marrable*, [1913] 2 Ch. 421.

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purposes, etc.). Such an owner may also make use of the water for other purposes than ordinary ones, provided that, in so doing, he does not interfere with the similar rights of other riparian owners lower down the stream (*z*).

(2) An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream (*a*).

(3) There is, however, no right to the continued flow of water which runs through natural underground channels, which are *undefined* or *unknown*, and can *only be ascertained* by excavation (*b*).

(4) No one has a right to pollute the water percolating under his own land and flowing thence by underground channels into another's land so as to poison the water which that other has a right to use (*c*).

Illustrations. Rights of riparian owners.

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle, or turning his mill, and other purposes connected with his tenement, provided he does not thereby seriously diminish the stream (*d*). But he has no right to divert the water to a place outside his

(*z*) *Miner* v. *Gilmour*, 12 Moo. P. C. C. 131; *Embrey* v. *Owen*, 6 Ex. 353.

(*a*) *Baily & Co.* v. *Clark, Son and Morland*, [1902] 1 Ch. 649 [C. A.]; *Whitmore's (Edenbridge), Limited* v. *Stanford*, [1909] 1 Ch. 427; *Stollmeyer* v. *Trinidad Petroleum Development Co.*, [1918] A. C. 498.

(*b*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655.

(*c*) *Ballard* v. *Tomlinson*, 29 Ch. D. 115 [C. A.].

(*d*) *Embrey* v. *Owen*, 6 Ex. 353; *White (John) & Sons* v. *White (J. and M.)*, [1906] A. C. 72.

tenement, and there consume it for purposes unconnected with the tenement (*e*). **Art. 108.**

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrong-doer for violation of the right, even though he may not be able to prove that he has suffered any actual loss (*f*). So if one erects a weir which affects the flow of water to riparian owners lower down the river, an injunction will be granted (*g*). Disturbance of riparian rights.

(3) But where a riparian owner takes water from a river, and after using it for cooling certain apparatus returns it undiminished in quantity and unpolluted in quality, a lower riparian owner has no right of action. For his only right is to have the water abundant and undefiled, and that right is not infringed (*h*).

(4) The owner of land containing underground water, which percolates by *undefined* channels, or by defined but *unascertained* channels, and flows to the land of a neighbour, has the right to divert or appropriate the water within his own land so as to deprive his neighbour of it (*i*). The same rule applies to common surface water rising out of springy or boggy ground and flowing in no defined channel (*k*). Abstracting underground water.

(*e*) *McCartney* v. *Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301 ; *Att.-Gen.* v. *Great Northern Rail. Co.* (1908), 72 J. P. 442.

(*f*) *Wood* v. *Waud*, 3 Ex. 748 ; *Embrey* v. *Owen*, 6 Ex. 353 ; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478.

(*g*) *Belfast Ropeworks* v. *Boyd*, 21 L. R. Ir. 560 [C. A.].

(*h*) *Kensit* v. *Great Eastern Rail. Co.*, 27 Ch. D. 122 [C. A.]. In that case the water was abstracted by a non-riparian owner under a licence from a riparian owner. This licence, however, could not confer any right, as a riparian owner clearly cannot confer on others such rights as he has as riparian owner. But, as the action failed against the non-riparian owner, *a fortiori* it would against a riparian owner taking away water and returning it undiminished and unpolluted.

(*i*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349 ; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655 ; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587, see *ante*, p. 228.

(*k*) *Rawstron* v. *Taylor*, 11 Ex. 369.

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Fouling underground water.

(5) But although there can be no *property* in water running through *underground undefined* channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard* v. *Tomlinson* (*l*), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by the Court of Appeal that an action lay; for there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other. The one merely deprives a man of something in which he has no property, the other causes an active nuisance.

Exception. Prescriptive rights.

Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*m*).

ART. 109.—*Disturbance of Private Rights of Way.*

(1) A right of way over the land of another can only arise by grant, express or implied, or by prescription.

(2) A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing its free user.

Right restricted by the terms of the grant or the extent of the user.

(1) We are here dealing with private rights of way, as distinguished from public rights of way. A public way or highway is a right enjoyed by the public to pass over land. A private right of way is a right one person may enjoy by grant or prescription to pass over another's land, or which an owner of land may have by grant or prescription for himself, his tenants and servants to pass over the lands of another.

(*l*) 29 Ch. D. 115.

(*m*) See *Mason* v. *Hill*, 3 B. & Ad. 304; *Carlyon* v. *Lovering*, 1 H. & N. 784; *Whitehead* v. *Parks* (1858), 2 H. & N. 870.

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There may also by custom be a way which can only be lawfully used by the inhabitants of a parish for going to and from the parish church (*n*).

Obstruction of rights of way.

(2) It does not require a permanent obstruction to give rise to a right of action. Thus padlocking a gate (*o*), or permitting carts or wagons to remain stationary on the road in the course of loading and unloading, in such a way as to obstruct the passage over the road, will give rise to an action (*p*).

(*n*) See *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.
(*o*) *Kidgill* v. *Moor*, 9 C. B. 364.
(*p*) *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650.

CANADIAN NOTES TO CHAPTER XI. OF PART II.

Article 98.

The following cases may be referred to as illustrating various uses of property which may amount to an actionable nuisance:—

MacIntosh v. *City of Westmount* (1912), 8 D. L. R. 820: hospital for contagious diseases.

Beamish v. *Glenn* (1916), 36 Ont. L. R. 10; 28 D. L. R. 702: blacksmith's shop.

Pope v. *Peate* (1904), 7 Ont. L. R. 207: music lessons (injunction refused upon the evidence).

Drysdale v. *Dugas* (1896), 26 S. C. R. 20: odours from a livery stable.

Chandler Electric Co. v. *H. H. Fuller & Co.* (1892), 21 S. C. R. 337: escaping steam.

Audette v. *O'Cain* (1907), 39 S. C. R. 103: melting water leaking from an ice-house.

Appleby v. *Erie Tobacco Co.* (1910), 22 Ont. L. R. 533: odours from a tobacco factory.

An erection which is not a nuisance at common law does not become so merely because it is prohibited by a city by-law: *Preston* v. *Hilton* (1920), 48 Ont. L. R. 172; 55 D. L. R. 647.

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In *Drysdale* v. *Dugas* (1896), 26 S. C. R. 20, the livery stable had been constructed in the most modern and scientific manner possible. But the court held that, since the odours in fact constituted a nuisance, the defendant was liable. Taschereau, J., citing French authorities to shew that the civil law doctrine led to the same result as the common law on this matter.

In *Cusson* v. *Galibert* (1902), 22 Que. S. C. 193, the plaintiff purchased a house adjoining a tannery. The evidence disclosed a certain amount of inconvenience, but no material injury to property, and the action was dis-

missed. The following *considérants* may be cited from the formal judgment of Archibald, J.:—

"Considering that by law neighbours are obliged to endure the reasonable inconveniences which arise from neighbourhood, and that the nature and degree of such inconveniences vary according to circumstances of place, occupation, and quality of the population:

"Considering that it is proved that the neighbourhood in question is a manufacturing one: that the defendants' tannery has been exploited for a great number of years, long previous to the plaintiff's purchase of his property in question: that the defendants have employed the best known means to minimise the inconveniences resulting to their neighbours from the operation of their works:

"Considering that, under the circumstances proved, the inconvenience which plaintiff is suffering is not greater than a neighbour is bound to endure:.....

"Doth dismiss the plaintiff's action with costs."

For other cases where the character of the neighbourhood influenced the decision, see *Oakley* v. *Webb* (1916), 38 Ont. L. R. 151; 33 D. L. R. 35, and *Beamish* v. *Gleun* (1916), 36 Ont. L. R. 10; 28 D. L. R. 702.

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See the case of *Love* v. *Machray*, cited above in the notes to Article 97.

ARTICLE 102.

The claim to a prescriptive right to commit a nuisance almost invariably arises in cases of the pollution of streams. For example illustrating the rules laid down in the text see *Hunter* v. *Richards* (1913), 28 Ont. L. R. 267; 12 D. L. R. 503; *Cardwell* v. *Breckinridge* (1913), 11 D. L. R. 461.

ARTICLE 103.

In *Mackenzie* v. *Kayler* (1905), 15 Man. L. R. 660; 1 W. L. R. 290, the nuisance was committed by the tenant. It was held that the landlord could not obtain an injunction, unless he could prove injury to the reversion, but

that adjoining tenants holding from the landlord could maintain the action.

Similarly a mortgagee cannot sue, unless he shews that his security will be imperilled: *Preston* v. *Hilton* (1920), 48 Ont. L. R. 172; 55 D. L. R. 647.

ARTICLE 104.

In *Suttlees* v. *Cautin* (1915), 22 B. C. R. 139; 32 W. L. R. 101; 8 W. W. R. 1293; 24 D. L. R. 1, it was held that the nuisance caused by the washing down of mining tailings on to another's land gives the aggrieved owner the right to enter upon his neighbour's land without notice and abate the nuisance.

But any exercise of the right of abatement must be exercised with caution and moderation: see the notes to Articles 95-96.

ARTICLES 105-106.

In *Boyd* v. *City of Toronto* (1911), 23 Ont. L. R. 421, the defendant corporation had dug a sewer in the street which caused the collapse of the plaintiff's land together with the house built upon it. The evidence shewed that the excavation was sufficient to cause a subsidence of the land even without the weight of the building. Upon these facts it was held that the plaintiff could succeed, and that the collapse of the house must be reckoned in estimating the damage.

Iredale v. *Loudon* (1908), 40 S. C. R. 313, was a case which raised the question of the legal nature of the right of support acquired by an upper flat against the lower portion of the building. Three judges out of five in the Supreme Court held that twelve years' occupation of a room without payment of rent gave the tenant a possessory title under the Statute of Limitations. One of the majority judges held that the right of support from the lower wall was a proprietary right which was acquired with the title. The other two held that the right of support was an easement for which twenty years' prescription was required, and that the title only extended to so much of the structure as actually rested on the soil.

ARTICLE 107.

In ancient lights cases the burden of proof is, first upon the claimant to shew an uninterrupted user of the light for

twenty years, and then upon the other party to give evidence of facts negativing the presumption which the claimant has set up: *Feigenbaum* v. *Jackson* (1901), 8 B. C. R. 117.

ARTICLE 108.

The student must bear in mind that the English law of waters is only applicable to Canada subject to important modifications arising out of the special circumstance of the country and the course of legislation. Certain rights which exist in Canada; such as the right of logging and the public right of ice-harvesting in navigable waters, are unknown to the English law.

For example, a provincial statute in British Columbia has taken away the common law right of a riparian proprietor to the undiminished flow of the stream: *Cook* v. *City of Vancouver* (1914), A. C. 1077.

The student should read carefully the elaborate judgement of Beck, J., in the case of *Makowecki* v. *Yachimyc* (1917), 10 Alta. L. R. 366, where an important distinction is drawn between (*a*) lakes and ponds, (*b*) natural streams, and (*c*) surface water running in defined channels.

The right of the riparian owner to unpolluted water is an absolute proprietary right, and it is unnecessary for him to prove actual damage: *Crowther* v. *Town of Cobourg* (1912), 1 D. L. R. 40. See also *Nipisiquit Co.* v. *Canadian Iron Corporation* (1913), 42 N. B. R. 287; 13 E. L. R. 158; 14 D. L. R. 352.

The right of lumbermen to float logs down "floatable" streams is everywhere governed by statute. It is commonly called an "easement," though the accuracy of this term seems to be questionable. In any event it is not a paramount right, but a right in the nature of a servitude, which must be exercised with such care as is necessary to prevent injury to riparian property: *Ward* v. *Township of Grenville* (1902), 32 S. C. R. 510. Any unauthorised obstruction of the right to float logs is a tort which gives rise to an action: *Farquharson* v. *Imperial Oil Co.* (1899), 30 S. C. R. 188, 216.

The exercise of the public right of ice-cutting in navigable waters involves the right to bring the ice ashore, and the harvester may cut a channel through the ice in privat-

water lots for that purpose: *Lake Simcoe Ice & Cold Storage Co.* v. *McDonald* (1901), 31 S. C. R. 130.

Article 109.

In *Barbeau v. McKeown* (1917), 51 Que. S. C. 311, the defendant, desiring to protect the property from tramps and loafers, placed a locked gate across the plaintiff's right of way, and gave the plaintiff a key. It was held that this amounted to an unjustifiable obstruction.

Quebec Law.

Although some of the cases cited above arise under the Civil Code, the student must bear in mind that the space available for these notes does not permit of an adequate summary of the Quebec rules, which in many respects differ from the law of the other provinces. The Quebec law on this subject is contained in Articles 499-566 of the Code, which should be studied with the aid of the standard commentaries thereon.

CHAPTER XII.

TRESPASS TO THE PERSON.

In the case of most of the torts which we have hitherto considered, there was a wrongful act distinct from the damage to the plaintiff, and which would, if it had not been followed by damage, have given no right of action. But in the case of trespass to the person, and of trespass to land and goods, the wrongful act and the damage resulting from it are practically indivisible. These are what are spoken of in many text-books as *injuriæ*. They require no proof of damage resulting from the wrongful act. The mere fact that a private right has been infringed **without lawful excuse,** constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated, *e.g.*, by false imprisonment. Introductory.

Trespass consists in (a) infringements of the right of safety and freedom of the person (trespass to the person); (b) infringements of rights of real property (trespass to land); and (c) infringements of rights to goods (trespass to goods).

Art. 110.—*General Liability for Trespass to the Person.*

(1) Trespass to the person may be by assault, battery, or false imprisonment.

(2) Any person who commits a trespass to the person whether by assault, battery, or imprisonment without lawful justification commits a tort.

The older writers speak of six kinds of trespasses to the person: threats, assault, battery, wounding, mayhem (or Ancient classification.

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maiming) and false imprisonment. But at the present time it is sufficient to distinguish the three groups above mentioned.

Onus of proof.

Primâ facie every hostile interference with the person or liberty of another is wrongful without proof of damage; but as we shall see, acts which are *primâ facie* trespasses may often be justified. The burden of proof of justification always lies on the defendant. The plaintiff need only prove that without his consent the defendant committed an act which would *primâ facie* amount to a trespass to the person, and it is for defendant to justify if he can.

ART. 111.—*Definition of Assault.*

An assault is an attempt or offer to apply force to the person of another directly or indirectly if the person making the attempt or offer causes the other to believe on reasonable grounds that he has the present ability to execute his purpose (*a*).

Attempt.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present *primâ facie* ability to do harm to the person of another, although no harm be actually done, it is nevertheless an assault. For example, menacing with a stick a person within reach thereof, although no blow be struck (*b*); or striking at a person who wards off the blow with his umbrella or walking-stick, would constitute assaults.

Threat.

(2) But a mere verbal threat is no assault; nor is a threat consisting not of words but gestures, unless the other party be induced on reasonable grounds to believe that there is present ability to carry it out. The essence of the tort is *that the wrongdoer puts the other in present fear of violence*. This was illustrated by POLLOCK, C.B., in *Cobbett* v. *Grey* (*c*). "If," said the learned judge, "you direct a weapon, or if you raise your fist within those limits

(*a*) See the Criminal Code (Indictable Offences) Bill, 1879, s. 3.
(*b*) *Read* v. *Coker*, 13 C. B. 850.
(*c*) 4 Ex. 729, at p. 744.

which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*d*), 'I will commit an assault,' I think that is not an assault." Art. 111.

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*e*).

(4) For the same reason, shaking a stick in sport at another is not actionable (*f*).

ART. 112.—*Definition of Battery.*

(1) Battery consists in touching another's person hostilely or against his will, however slightly (*g*).

(2) If the violence be so severe as to wound, and *a fortiori* if the hurt amount to a "mayhem" (that is, a deprivation of a member serviceable for defence in fight), the damages will be greater than those awarded for a mere battery; but otherwise the same rules of law apply to these injuries as to ordinary batteries.

(1) This touching may be occasioned by a missile or any instrument set in motion by the defendant, as by throwing water over the plaintiff (*h*), or spitting in his face, or causing another to be medically examined against his or her will (*i*). In accordance with the rule, a battery must be involuntary: therefore a beating voluntarily suffered is not actionable; for *volenti non fit injuria* (*j*). Illustrations.

(2) Merely touching a person in a friendly way in order to engage his attention, is no battery (*k*). Friendly touching.

(*d*) *Query*—Battery.
(*e*) *Tuberville* v. *Savage*, 1 Mod. Rep. 3.
(*f*) *Christopherson* v. *Blare*, 11 Q. B. 473, at p. 477.
(*g*) *Rawlings* v. *Till*, 3 M. & W. 28.
(*h*) *Pursell* v. *Horn*, 8 A. & E. 602.
(*i*) *Latter* v. *Braddell and Sutcliffe*, 29 W. R. 239.
(*j*) *Christopherson* v. *Blare*, 11 Q. B. 473.
(*k*) *Coward* v. *Baddeley*, 28 L. J. Ex. 260.

Art. 112.

Pure accident.

(3) An entirely unintentional touching, which is the result of pure accident, does not amount to trespass. Where one of a shooting party fired at a pheasant and a shot from his gun glanced off a tree and accidentally wounded the plaintiff, a carrier, it was held that there was no trespass (*l*). But whenever an injury to the person is the result of an act of direct force, it amounts to trespass to the person if it is wrongful, either as being **wilful** or as being **the result of negligence** (*m*).

Accident in course of doing unlawful act.

(4) But a touch unintentional and without negligence is an assault if it be done **in the course of doing an unlawful act** (*n*). Thus, where a tramway company was authorised by statute to run a steam tramcar on a public road, the statute must be taken to impose on the company a duty to see that the cars and tramway, and all necessary apparatus, are kept in proper condition for this purpose. If they fail to do so, and the tramway be in an improper condition, then, in running their cars on that tramway, they are doing **that which they are not authorised to do by their Act.** They are only authorised to be on the highway at all by their Act ; and as regards the public, they can only justify using the tramway if they are doing what the Act allows them to do. If, therefore (apart from any question of negligence), a car runs on the defective tramway, and injures a passer-by, the company will be liable ; for it is a direct injury to the person done in the course of doing an unlawful act, and without justification or excuse (*o*).

ART. 113.—*Definition of False Imprisonment.*

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification (*p*). The restraint

(*l*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

(*m*) *Per* BRAMWELL, B., in *Holmes* v. *Mather*, L. R. 10 Ex. 261.

(*n*) *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.*, 23 Q. B. D. 17 [C. A.].

(*o*) *Ibid.*

(*p*) *Bird* v. *Jones*, 7 Q. B. 742.

may be either physical or by a mere show of authority. **Art. 113.**

Moral restraint.

Imprisonment does not necessarily imply incarceration, but any restraint by force or show of authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*q*). So, too, it is imprisonment if one is restrained in his own house from leaving a room and going upstairs (*r*). But some *total* restraint there *must* be, for a partial restraint of locomotion in a particular direction (as by preventing the plaintiff from exercising his right of way over a bridge) is no imprisonment; for no restraint is thereby put upon his liberty (*s*).

Actual restraint for however short a time constitutes imprisonment—as when a prisoner who has been acquitted was taken down to the cells and detained for a few minutes whilst questions were put to him by the warders (*t*).

False imprisonment and malicious prosecution distinguished.

The distinction between false imprisonment and malicious prosecution is that the former unjustifiably restrains the liberty of the person—the latter is the malicious institution against another of bankruptcy or criminal proceedings without reasonable cause and may frequently be the actual precursor of false imprisonment, but malicious prosecution sets in motion *judicial* process. False imprisonment sets in motion *executive* process.

Habeas corpus.

In addition to the remedy by action, the law affords a peculiar and unique summary relief to a person wrongfully imprisoned, viz., the writ of *habeas corpus ad subjiciendum*.

This writ may be obtained by motion made to any superior court, or to any judge when those courts are not sitting, by any of his Majesty's subjects. The party moving must show probable cause that the person whose release he desires is wrongfully detained. If the court or judge thinks

(*q*) *Warner* v. *Riddiford*, 4 C. B. (N.S.) 180.

(*r*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; see *Harvey* v. *Mayne*, 6 Ir. C. L. R. 417.

(*s*) *Bird* v. *Jones*, *supra*.

(*t*) *Mee* v. *Cruikshank*, 86 L. T. 708.

Art. 113. that there is reasonable ground for suspecting illegality, the writ is ordered to issue, commanding the detainer to produce the party detained in court on a specified day, when the question is summarily determined. If the detainer can justify the detention, the prisoner is remitted to his custody. If not, he is discharged, and may then have his remedy by action (*u*).

ART. 114.—*Justification of Trespass to the Person.*

A trespass to the person, whether amounting to assault, battery, or false imprisonment, may be justified by the defendant as being authorised by the exercise of a right at common law or by statute, and if the defendant prove the facts alleged in justification, the plaintiff must fail.

Justification.

Trespass to the person may be justified as being (a) in defence of property or person (*x*); (b) as being in the exercise of parental or other special authority (*y*); (c) as being an arrest or imprisonment made by judicial authority (*z*); (d) as being an arrest on suspicion of felony or misdemeanor, or for preservation of the peace (*a*); (e) for execution of legal process, *e.g.*, search authorised by law (*b*).

But in every case the force used must not exceed that which is reasonably required in the circumstances, and any excess of violence amounts to a trespass.

ART. 115.—*Self-defence as Justification of Assault and Battery.*

Assault and battery is justified if made in self-defence or in defence of real or personal property, provided the force used does not exceed that

(*u*) See 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.
(*x*) See Art. 115.
(*y*) See Art. 116.
(*z*) See Art. 117.
(*a*) See Arts. 118–122.
(*b*) *Taylor* v. *Pritchard*, [1910] 2 K. B. 320.

which is reasonably required in the circumstances. Art. 115.

Any violence in excess of what is reasonably necessary is a trespass.

(1) A battery is justifiable if committed in self-defence. Such a plea is called a plea of "son assault demesne." But, to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*c*). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*d*). Self-defence.

(2) A battery committed in defence of real or personal property is justifiable. Thus, if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, I must first request him to leave. If after that he still refuses, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*e*). Defence of property.

(3) Lord E. was steward of Doncaster Races. With his sanction, tickets for the grand stand were issued at one guinea each, entitling the holder to come into the stand and the enclosure. The plaintiff, having bought a ticket, came into the enclosure. The defendant, by order of Lord E., asked him to leave, and when he refused, after a reasonable time had elapsed, put him out, using no unnecessary violence, but not returning the guinea:—*Held*, that the defendant was justified, as he was acting by order of Lord E. in removing the plaintiff from Lord E.'s enclosure. The ticket was a revocable licence, and as soon as it was revoked, the plaintiff was a trespasser (*f*). But since the Judicature Act this rule has ceased largely, if not entirely, to be enforceable, and a licensee whose licensor can be compelled by injunction to allow him to do the act licensed cannot be treated as a trespasser because he does that act. In

(*c*) *Cockroft* v. *Smith*, 11 Mod. Rep. 43.

(*d*) *Cook* v. *Beal*, Ld. Raym. 177.

(*e*) *Wheeler* v. *Whiting*, 9 C. & P. 262; *Hemmings and Wife* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720.

(*f*) *Wood* v. *Leadbitter*, 13 M. & W. 838.

Art. 115.

Hurst v. *Picture Theatres, Limited* (*g*), it was held by the Court of Appeal that a person who had bought a ticket for a seat at a cinema performance could sue *in tort* for damages for forcible ejection by the defendants' servants acting on the erroneous impression that he had obtained admission without payment.

Imprisonment not justified.

(4) It should be added that an owner of property is *not* justified in forcibly detaining another to compel restitution of his property (*h*).

ART. 116.—*Justification by Parental or Other Authority.*

Assault and imprisonment may be justified as being done in the lawful exercise of parental or other authority.

Parental and other authority.

(1) A father may moderately chastise his son, and this authority he may delegate to a schoolmaster. Schoolmasters are justified in moderately chastising and in putting restraint on the liberty of their pupils; and this authority extends to chastisement for offences committed whilst going to and returning from school (*i*). But for any excess of punishment an action for assault or false imprisonment lies. So, too, a master may chastise his apprentice (*j*.)

Marital authority.

(2) It was formerly thought that a husband had the right of chastising and imprisoning his wife—but this can no longer be regarded as the law (*k*).

Naval and military officers.

(3) Officers in the army and navy, and officers of territorials have statutory authority by which they may justify assaults and imprisonment of the men under them as being authorised punishments for military or naval offences (*l*).

(*g*) [1915] 1 K. B. 1.
(*h*) *Harvey* v. *Mayne*, 6 Ir. C. L. 471.
(*i*) *Cleary* v. *Booth*, [1893] 1 Q. B. 465.
(*j*) *Penn* v. *Ward*, 2 C. M. & R. 338.
(*k*) *R.* v. *Jackson*, [1891] 1 Q. B. 671 [C. A.]; *Scully* v. *Scully* (1921), Times Newspaper, 24th June, *et seq.*
(*l*) See *Marks* v. *Frogley*, [1898] 1 Q. B. 888 [C. A.].

ART. 117.—*Justification by Judicial Authority.*

When a person is arrested or imprisoned by judicial authority no action for trespass to the person lies against the judge who gives the authority, or against persons executing his orders, or against the person who set the law in motion.

Distinction between false imprisonment and malicious prosecution.

This general proposition must be read with the qualifications and explanation given in Arts. 8 and 9, where we have discussed the consequences of irregularities and want of jurisdiction. Assuming the judgment, sentence, or order to be regular, and the imprisonment or arrest to be authorised by it, the protection is absolute, and no action for assault or false imprisonment will lie against the judge, or against the persons who carry out the order, or against the person who procured the order from the judge.

(1) So if I lay an information before a justice, upon which he issues his warrant for the arrest of the alleged offender, it is his arrest and not mine. Though I may be liable in an action for malicious prosecution I cannot be liable in an action for false imprisonment.

(2) But if, without the interposition of any judicial authority, I request a constable to arrest a person, I make him my agent for that purpose, and, if the arrest is not justifiable on some ground, I am liable as if I had myself arrested him. Accordingly it is important to distinguish clearly cases where the arrest is *judicial* from those where it is not. The distinction is thus laid down by WILLES, J. (*m*) :

Rule laid down by WILLES, J.

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the

(*m*) *Austin* v. *Dowling*, L. R. 5 C. P. 534, at p. 540.

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charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

(3) False imprisonment only lies where the defendant has **taken on himself the responsibility of directing the imprisonment.** When a person merely gives information to a police officer, and he arrests on his own initiative, the person giving the information is not guilty of a trespass (*n*), though, of course, the police officer may be.

So, too, signing a charge sheet is not in itself evidence of anything supporting an action for false imprisonment against the person who signs (*n*). Though, when accompanied by other circumstances (as in *Austin* v. *Dowling* (*o*)), it may show that the person who signs authorises the imprisonment.

ART. 118.—*Power of Magistrates to Arrest or order Arrest.*

If a felony, or breach of the peace, be committed **in view of a justice,** he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But if he be not present, he must issue his written warrant to apprehend the offender (*p*).

Warrant for arrest.

Except in the case mentioned in this Article a magistrate can only justify an arrest made by his order if he has issued a written warrant for arresting the person arrested. A warrant is an authority to the person to whom it is directed (usually a constable) to arrest the person named therein. It is issued by a justice of the peace upon information given to him that the person to be arrested is

(*n*) *Grinham* v. *Willey*, 4 H. & N. 496; followed in *Sewell* v. *National Telephone Co.*, [1907] 1 K. B. 557.

(*o*) L. R. 5 C. P. 534.

(*p*) 2 Hale P. C. 86.

suspected of having committed an offence. The magistrate in issuing a warrant acts judicially, and at common law the warrant was an absolute justification for any arrest made by a constable within the terms of the warrant, provided the magistrate had jurisdiction (*q*). But there are some cases in which an arrest may lawfully be made without warrant; these are dealt with in the following Articles. Art. 118.

ART. 119.—*Power of Constables and Others to Arrest in Obedience to Warrant.*

No action lies against a constable, or any person acting by his order and in his aid, for anything done in obedience to any warrant issued by any justice of the peace notwithstanding any defect of jurisdiction of such justice (*r*).

NOTE.—At common law an action lay against a constable if he arrested a person upon a warrant issued by a justice who had no jurisdiction to issue it (see *ante*, Art. 9), but constables and those assisting them are protected by this enactment, whether the justice of the peace has jurisdiction to issue the warrant, or not.

The statute does not, however, afford any protection to a constable who does something not authorised by the warrant, as, *e.g.*, if he arrests the wrong person.

ART. 120.—*Arrest for Felony without Warrant.*

(1) **Any person** may arrest another without a warrant **if a felony has in fact been committed,** and he has reasonable grounds for suspecting that the person arrested has committed the felony.

(2) **A constable** may arrest any person without a warrant **if he has reasonable grounds** for thinking that a felony has been committed, and

(*q*) See *ante*, Art. 9. (*r*) 24 Geo. 2, c. 44, s. 6.

Art. 120. that it has been committed by the person arrested.

Felons.

A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise, and the defendant must show that the particular felony in respect of which the plaintiff was arrested had been in fact committed (*s*).

In an action for false imprisonment, where the defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal trial was *res inter alios acta*, and is not binding on the defendant in a distinct proceeding (*t*).

Cases of suspected felony.

As we have seen, a *private* person can only arrest a suspected felon in cases where a felony has actually been committed by some one; and if it should turn out that no such felony was ever committed, he will be liable, however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed before acting; and consequently the law provides that a constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed, he will not be liable (*u*). The suspicion, however, must be a reasonable one, or the constable will be liable.

Constables.

The constable was formerly an officer appointed for a constablewick or other district, who had at common law certain powers within that district. Police constables are

(*s*) *Beckwith* v. *Philby*, 6 B. & C. 635; *Walters* v. *Smith*, [1914] 1 K. B. 595.

(*t*) *Cahill* v. *Fitzgibbon*, 16 L. R. Ir. 371.

(*u*) *Marsh* v. *Loader*, 14 C. B. (N.S.) 535; *Griffin* v. *Coleman*, 28 L. J. Ex. 134.

now appointed for counties and boroughs under various statutes, and the constables so appointed have throughout the counties or boroughs for which they are appointed, the powers which at common law a constable had within his constablewick, together with other statutory powers (*x*). Art. 120.

Illustrations.

(1) Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*y*). But, on the other hand, where a constable knows that a warrant is out against a man, that is sufficient ground for his reasonably suspecting that a felony has been committed (*z*).

(2) But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes the other into custody, the party making the charge, and not the constable, is liable (*a*). "It would be most mischievous," Lord MANSFIELD remarks, "that the officer should be bound first to try, and at his peril exercise his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*b*).

ART. 121.—*Power of Arrest for Preservation of the Peace.*

For the sake of preserving the peace, any person who sees it broken may without a warrant arrest him whom he sees breaking it at the moment of the affray or immediately after, so

(*x*) See the Police Acts, especially s. 8 of the County Police Act, 1839, and the Municipal Corporations Act, 1882, s. 191.

(*y*) *Hogg* v. *Ward*, 27 L. J. Ex. 443.

(*z*) *Creagh* v. *Gamble*, 24 L. R. Ir. 458.

(*a*) *Davis* v. *Russell*, 5 Bing. 354.

(*b*) *Griffin* v. *Coleman*, 4 H. & N. 265.

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long as there is a reasonable prospect of a renewal of the affray (*c*).

The right of arrest stated in this Article is only to prevent disturbances of the peace. It seems that all persons taking part in the affray may be arrested—provided there is a prospect of the affray being renewed—and may be detained till the heat is over, and may then be delivered to a constable to be taken before a magistrate. Thus, when the plaintiff entered the defendant's shop and exchanged blows with a shopman, the defendant was justified in arresting him and handing him over to the constable, on the ground that though the affray had not been actually committed in his presence, yet the plaintiff persisted in remaining on the premises in such circumstances as made it seem probable that he would renew the disturbance unless he was taken into custody (*c*). In such circumstances it seems that a constable is justified in taking the disturber upon the information of one who has seen the affray (even though he was not himself present) if there is a prospect of its being renewed (*c*). There is some authority for saying that a constable may arrest immediately after an affray even though there is no prospect of the affray being renewed; but the proposition is open to doubt.

ART. 122.—*Arrest for Misdemeanor.*

No person has at common law power to arrest another for a misdemeanor without a warrant; but by various statutes powers of arrest for misdemeanor are given to constables and others to arrest without a warrant.

The following list is not complete, but it contains some examples of statutory powers of arrest for misdemeanor:

Night offenders.

(1) Any person may arrest and take before a justice one *found committing* an indictable offence between 9 P.M. and 6 A.M. (*d*).

(*c*) *Timothy* v. *Simpson*, 1 Cr. M. & R. 757.

(*d*) 14 & 15 Vict. c. 19, s. 11; and see *Trebeck* v. *Croudace*, [1918] 1 K. B. 158, a case under s. 12 of the Licensing Act, 1872.

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(2) The owner of property or his servant, or a constable, may arrest and take before a magistrate anyone *found committing* malicious injury to such property (*e*). Malicious injurers.

(3) Any person may arrest and take before a magistrate one *found committing* an act of vagrancy (*f*). Vagrants.

N.B.—Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which one must refer to the fourth section of the Act.

(4) A constable or churchwarden may apprehend, and take before a magistrate, any person disturbing divine service (*g*). Brawlers.

(5) Many Acts of Parliament give powers of arrest of persons committing offences and refusing to give their names and addresses when requested. See, for instance, the Railways Clauses Consolidation Act, 1845, s. 154, and the Motor Car Act, 1903. Other Acts.

ART. 123.—*Institution of Criminal Proceedings endangers Right of Action for Assault.*

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged.

If any person shall have **obtained a certificate of dismissal** or **having been convicted shall have suffered the punishment inflicted,** he shall be released from all further or other proceedings, civil or criminal, for the same cause (*h*).

(*e*) 14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97, s. 61.
(*f*) 5 Geo. 4, c. 83. (*g*) 23 & 24 Vict. c. 32, s. 3.
(*h*) 24 & 25 Vict. c. 100, ss. 42-45.

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Comment.

(1) A certificate can only be granted by magistrates where there has been a hearing upon the merits. Where the prosecutor, having obtained a summons, did not attend to give evidence and the magistrates dismissed the summons, the magistrates had no jurisdiction to give a certificate of dismissal (*i*). The fact that the accused has been ordered by the magistrates to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*j*).

(2) The granting a certificate by magistrates where the complaint is dismissed, is not merely discretionary. Magistrates are bound, on proper application, to give the certificate mentioned in the section (*k*); and, if they refuse to do so, may be compelled by *mandamus* (*l*).

(3) The words "from all further or other proceedings, civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any *other* person (*m*) consequentially aggrieved thereby (*n*).

ART. 124.—*Amount of Damages.*

In assessing the damages for an assault, or battery, or false imprisonment, the time when, and the place in which, the trespass took place should be taken into consideration.

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks BATHURST, J., in *Tullidge* v. *Wade* (*o*), "to be beaten upon the Royal Exchange than in a private room."

(*i*) *Reed* v. *Nutt*, 24 Q. B. D. 669.
(*j*) *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553.
(*k*) *Hancock* v. *Somes*, 28 L. J. M. C. 196.
(*l*) *Costar* v. *Hetherington*, 28 L. J. M. C. 198.
(*m*) *E.g.*, the complainant's husband.
(*n*) *Masper* v. *Brown*, 1 C. P. D. 97.
(*o*) 3 Wils. 18, at p. 19.

CANADIAN NOTES TO CHAPTER XII. OF PART II.

Articles 110-112.

The Criminal Code (s. 290) abolishes for criminal purposes the distinction between assault and battery, both actual and threatened violence being included under the term "assault." This does not, strictly speaking, affect any question of purely civil liability, but for practical purposes the distinction is no longer of importance, and the practice has now sprung up of using the word "assault" to cover both torts.

The least touch, if it be delivered with a hostile intention, amounts to an assault. For example, in *Iler* v. *Gass* (1909), 7 E. L. R. 98, an action against a police officer, the defendant did no more than gently place his hand upon the plaintiff's arm with the intention of arresting her. The court held that the intention was the governing factor and that his act therefore amounted to a technical assault.

The act of a cyclist in running down a pedestrian raises against him a *prima facie* case of assault, and throws upon him the onus of shewing justification or excuse: *Woolman* v. *Cummer* (1912), 8 D. L. R. 835.

Article 113.

There seems to be no Canadian authority directly illustrating the meaning of "false imprisonment," which in Canada is often called "false arrest."

In *Birmingham Ledger Co.* v. *Buchanan* (1914), 10 Ala. App. 527; 65 So. 667, the Alabama court held that a newspaper company was liable for false imprisonment in refusing to allow some newsboys to leave the office premises until a special "extra" edition was ready. It should be added that they had been detained with the object of preventing them from selling other papers.

Articles 114-122.

Under the heading "Justification or Excuse" the Criminal Code now contains an elaborate catalogue (ss. 16-68)

of the defences which may be pleaded on the ground of self-defence, necessity, discipline, or official authority, to a criminal charge. Any other common law defences are saved by section 16. Although the provisions of the Code do not strictly affect civil liability, the student may take these sections as a sufficient statement of the law applicable to actions for assault and false imprisonment. Provincial statutes provide for the civil protection of police officers and other public authorities on lines generally similar to those of the English law. The statutory rules are too long to be summarised here, and it will suffice to cite a few cases.

In *Evans* v. *Bradburn* (1915), 9 Alta. L. R. 523; 32 W. L. R. 585; 9 W. W. R. 281; 25 D. L. R. 611, the defendant in an assault cause pleaded self-defence. The plaintiff had called the defendant a liar, whereupon the defendant, first taking off his coat, proceeded to beat him. The Appellate Division, reversing the trial judgment, held that the plaintiff was entitled to damages.

In *Iler* v. *Gass* (1909), 7 E. L. R. 98, the defendant, a police officer, committed a technical assault on the plaintiff by arresting her under the belief that she was drunk, and pleaded in defence a statute permitting peace officers to arrest without warrant persons drunk or feigning to be drunk. It was held that his honest belief in the plaintiff's intoxication was no defence under the statute.

In *Washburn* v. *Robertson* (1912), 8 D. L. R. 183, the defendant, a justice of the peace, issued a warrant for the plaintiff's arrest without taking the precaution to see that all the statutory preliminaries had been fully observed. The court held that, until the conditions precedent had all been fulfilled, the magistrate was acting without jurisdiction, and was therefore liable in damages.

In *Anderson* v. *Johnston*, 10 Sask. L. R. 352; (1917), 3 W. W. R. 353; 38 D. L. R. 563, a plaintiff recovered damages who had been arrested in good faith upon a mistaken identification and then unnecessarily detained.

With regard to Article 120, it should be observed that the distinction between felony and misdemeanour has been abolished by section 14 of the Criminal Code. The Canadian rules corresponding to those of the text will be found in sections 30-38.

ARTICLE 123.

By section 734 of the Criminal Code the summary disposal of a charge of assault, whether by way of acquittal or of conviction, is a bar to any further civil or criminal proceedings arising out of the same matter. In all other matters it is provided (s. 13) that the fact of an offence constituting a crime is no bar to any civil remedy.

For a case illustrating the rule laid down in section 734 see *Hébert* v. *Hébert* (1909), 16 Can. Cr. Cas. 199.

ARTICLE 124.

This rule may be illustrated by the cases cited in the notes to Articles 114-123. In *Iler* v. *Gass*, where the assault was purely nominal and was committed in perfect good faith, the plaintiff was allowed five dollars damages without costs.

In *Evans* v. *Bradburn* the plaintiff, who was laid up for a fortnight, was allowed $37.50 for loss of time, as well as $15.00 for the doctor's bill. For general damages he was only given $50.00 on account of the provocation which he had offered.

Substantial damages should be awarded for an assault aggravated by circumstances of insolence and brutality, even though the plaintiff may have suffered no real physical injury: *McLeod* v. *Holland* (1913), 13 E. L. R. 509; 14 D. L. R. 634.

CHAPTER XIII.

OF TRESPASS TO LAND AND DISPOSSESSION.

SECTION I.—OF TRESPASS *QUARE CLAUSUM FREGIT*.

ART. 125.—*Definition.*

TRESPASS *quare clausum fregit* is committed in respect of another man's land, by entry on the same without lawful authority. It constitutes a tort without proof of actual damage.

Illustrations.

(1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*a*); or fox-hunting across land against the will of the owner (*b*).

Trespass of cattle.

(2) So, it is generally a trespass to allow one's cattle to stray on to another's land. Thus, where the plaintiff's mare was injured by the defendant's horse biting and kicking her through the fence separating plaintiff's and defendant's land, it was held that this was a trespass for which the defendant was liable apart from any question of negligence (*c*).

Exceeding authority.

(3) Where one has authority to use another's land for a particular purpose, any user going beyond the authorised purpose is a trespass.

(4) So, where a public highway runs across the lands of a landowner, the soil of which is vested in the owner, a member of the public who uses the road not merely in exercise of his right of way, but in order to interrupt the landowner's sport, is guilty of trespass. For he is using the site of the road for a purpose not covered by his

(*a*) *Lawrence* v. *Obee*, 1 Stark. 22; *Gregory* v. *Piper*, 9 B. & C. 591.

(*b*) *Paul* v. *Summerhayes*, 4 Q. B. D. 9.

(*c*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.

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limited right of user (*d*); for the public only have a right to use a highway for passing and repassing and not for loitering or depasturing cattle (*e*), or for watching the training of horses on the adjoining lands (*f*).

Exceptions.

In the following cases a person has lawful authority to enter upon another's land:

Retaking goods.

(1) If one takes and places on his own land another's goods, the latter may enter and retake them (*g*).

Cattle.

(2) If cattle escape on to another's land through the non-repair of a hedge which that other is bound to repair, the owner of the cattle may enter and drive them out (*h*).

Distraining for rent.

(3) So a landlord may enter his tenant's house to distrain for rent, or a sheriff to do execution; but they may not break open the outer door of a house (*i*).

Reversioner inspecting premises.

(4) A reversioner of lands may enter in order to see that no waste is being committed (*k*).

Grantee of easement.

(5) And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*l*).

Public rights.

(6) Land may be entered under the authority of a statute (*m*); or in exercise of a public right, as of a highway; or the right to enter an inn, provided there is accommodation (*n*). Also land may be entered to preserve property, *e.g.* where a fire breaks out the tenant of sporting rights may use such methods as are reasonably believed by him to be necessary to preserve his rights, and he will not be liable if it afterwards turns out that the course he adopted, though reasonable, was not necessary (*o*).

(*d*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142 [C. A.].

(*e*) *Dovaston* v. *Payne*, 2 H. Bl. 527; and 2 Sm. L. C. 160.

(*f*) *Hickman* v. *Maisey*, [1900] 1 Q. B. 752 [C. A.].

(*g*) *Patrick* v. *Colerick*, 3 M. & W. 483; *Coaker* v. *Willcocks*, [1911] 2 K. B. 124.

(*h*) See *Faldo* v. *Ridge*, Yelv. 74.

(*i*) *Semayne's Case*, 5 Co. Rep. 91 c.; 1 Sm. L. C. 104.

(*k*) *Six Carpenters' Case*, 1 Sm. L. C. 132; 8 Co. Rep. 146 a.

(*l*) *Pomfret* v. *Rycroft*, 1 Saund. 321.

(*m*) *Beaver* v. *Manchester Corporation*, 26 L. J. Q. B. 311.

(*n*) *Six Carpenters' Case*, *supra*; and see *R.* v. *Ivens*, 7 C. & P. 213.

(*o*) *Cope* v. *Sharpe* (1911), 132 L. T. Jo. 178.

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Liberum tenementum.

(7) Lastly, land may be entered on the ground that it is the defendant's, and that he has a right to immediate possession (*p*). A person in *wrongful* possession cannot treat the rightful owner as a trespasser (*q*). This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands. And a trespasser cannot get damages for forcible entry by the rightful owner unless more force than is necessary is used or there is a want of care in dealing with the trespasser's goods (*r*).

ART. 126.—*Trespassers* ab initio.

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance and not a mere nonfeasance (*s*).

Illustration.

Thus, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers (*s*).

(*p*) See *Ryan* v. *Clark*, 14 Q. B. 65.

(*q*) *Taunton* v. *Costar*, 7 Term Rep. 431.

(*r*) *Hemmings and Wife* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720.

(*s*) *Six Carpenters' Case*, 1 Sm. L. C. 132; 8 Co. Rep. 146 a.

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At common law this doctrine made a landlord a trespasser *ab initio* when he distrained for rent justly due, and he, or his bailiff, was guilty of any irregularity. This, however, was very hard on landlords, and by the Distress for Rent Act, 1737 (*t*), an irregularity in such circumstances does not make the distrainer a trespasser *ab initio*, and the tenant can only recover for the special damage sustained by the irregularity.

ART. 127.—*Possession necessary to enable the Plaintiff to maintain an Action of Trespass.*

(1) In order to maintain an action of trespass, the plaintiff must be in the possession of the land; for it is an injury to possession rather than to title. A mere *interesse termini* is not sufficient (*u*). But constructive possession, *i.e.*, by a servant or agent, or a present right to possess although no physical transfer has taken place, is sufficient (*v*).

(2) The actual possession of land suffices to maintain an action of trespass against any person wrongfully entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*w*).

(3) Where a person is in possession of land, the onus lies upon the *primâ facie* trespasser to show that he is entitled to enter (*x*).

(*t*) 11 Geo. 2, c. 19, ss. 19, 20, and see the Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 8, which gives the same relief in case of any irregularity in a distress for poor rates.

(*u*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*v*) *Glyn* v. *Howell*, [1909] 1 Ch. 666.

(*w*) *Jones* v. *Chapman*, 2 Ex. 803, at p. 821.

(*x*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Corporation of Hastings* v. *Ivall* (1874), L. R. 19 Eq. 585.

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Illustrations.

Possession necessary.

(1) Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*y*). But when he has once entered and taken possession, he may maintain trespass against a person who was wrongfully in possession at the time of his entry and continued so afterwards (*z*).

Possession by relation.

(2) A person who is not in actual possession at the time of the trespass may maintain trespass, if at the time of the trespass he was entitled to immediate possession, and at the time of action brought he has actual possession. His possession is then said to relate back in law to the time when the title arose, and he is considered as in possession from that time for the purposes of his action (*a*).

Surface and subsoil in different owners.

(3) Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*b*); but he may for a trespass to the subsoil, as by digging holes, etc. (*c*). So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*d*), unless the surface is disturbed thereby.

Highways, etc.

(4) When one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege given (*e*). An action for trespasses committed upon it, as, for instance, by throwing stones on to it, or erecting a bridge over it, may therefore be maintained by the owner of the soil (*f*).

(*y*) *Ryan* v. *Clark*, 14 Q. B. 65.

(*z*) *Butcher* v. *Butcher*, 7 B. & C. 399, at p. 402.

(*a*) *Anderson* v. *Radcliffe*, El. Bl. & El. 806; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493 [C. A.].

(*b*) *Cox* v. *Mousley*, 5 C. B. 533, at p. 546.

(*c*) *Cox* v. *Glue*, 17 L. J. C. P. 162.

(*d*) *Keyse* v. *Powell*, 22 L. J. Q. B. 305.

(*e*) *Goodtitle* v. *Alker*, 1 Burr. 133; *Northampton Corporation* v. *Ward*, 1 Wils. 114.

(*f*) *Every* v. *Smith*, 26 L. J. Ex. 344; and see Art. 125, Illustration 4, *supra*.

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ART. 128.—*Trespasses by Joint Owners.*

Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (*g*).

Ordinary joint holders.

(1) Among such acts may be mentioned the destruction of buildings (*h*), carrying off of soil (*i*), and expelling the plaintiff from his occupation (*j*).

Co-owners of mines.

(2) But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*k*). If more than the appropriate share be taken the remedy of the co-owner is not an action in tort for trespass, but an action for an account (*l*).

Party-walls.

(3) There is also one other important case of trespass between joint owners, viz., that arising out of a party-wall. If one owner of the wall excludes the other owner entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*m*).

ART. 129.—*Limitation.*

All actions for trespass to land must be commenced within six years next after the cause of action arose (*n*); but when a trespass is continuing, there is a new cause of action constantly arising, and the plaintiff may bring successive actions until the trespass ceases (*o*).

(*g*) See *Jacobs* v. *Seward*, L. R. 5 H. L. 464.
(*h*) *Cresswell* v. *Hedges*, 31 L. J. Ex. 497.
(*i*) *Wilkinson* v. *Haygarth*, 12 Q. B. 837.
(*j*) *Murray* v. *Hall*, 7 C. B. 441.
(*k*) *Job* v. *Potton*, L. R. 20 Eq. 84.
(*l*) *Jacobs* v. *Seward*, *supra*.
(*m*) *Stedman* v. *Smith*, 26 L. J. Q. B. 314; *Cubitt* v. *Porter*, 8 B. & C. 257.
(*n*) Statute of Limitations, 1623 (21 Jac. 1, c. 16), s. 3.
(*o*) *Bowyer* v. *Cook*, 4 C. B. 236.

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ART. 130.—*Remedies other than by Action.*

(1) One who is in possession of land may forcibly turn out another who wrongfully enters, using no more force than is reasonably necessary.

(2) When animals or other chattels are wrongfully upon land the person in possession may distrain them *damage feasant.*

Comment.

Distress damage feasant.

As to forcibly ejecting a trespasser, see *ante*, Art. 115. In the case of animals or other chattels found trespassing, the law gives the person in possession of the land the right to seize and detain them in order to compel the owner to make reasonable compensation for the damage done (*p*). There is no power of sale ; and the power of detention is only in respect of the actual damage done by the offending animal, either to the land itself or to other animals on the land (such as damage caused by one horse kicking another) (*q*). This remedy is not, however, available where animals are being actually tended ; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognising any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus, at common law, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*r*).

SECTION II.—OF DISPOSSESSION.

ART. 131.—*Definition.*

Dispossession or ouster consists of wrongfully withholding the possession of land from the rightful owner.

(*p*) See *Green* v. *Duckett*, 11 Q. B. D. 275.

(*q*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*r*) *Hannam* v. *Mockett*, 2 B. & C. 934, *per* BAYLEY, J. But the killing may amount to a criminal offence by the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23.

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Specific remedy.

Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment, and since that statute it is by an action for the recovery of land wherein the plaintiff claims possession of the land.

A successful plaintiff gets a judgment for possession and *mesne profits*, *i.e.*, damages for the profits of the land which the plaintiff has lost whilst the defendant was wrongfully in possession, and for any damage done to the land by him whilst he was in possession.

ART. 132.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*s*).

Possession *primâ facie* evidence of title.

(1) Thus, mere possession is *primâ facie* evidence of title until the claimant makes out a better one (*t*).

Title of successful claimant need not be indefeasible.

(2) But where the plaintiff makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one inclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*u*).

Jus tertii.

(3) Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to disprove that of the claimant (*w*). But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*x*).

(*s*) *Martin* v. *Strachan*, 5 Term Rep. 107.
(*t*) *Doe* d. *Smith* v. *Webber*, 1 A. & E. 119.
(*u*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.
(*w*) *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945.
(*x*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Richards* v. *Jenkins*, 17 Q. B. D. 544.

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Exceptions.

Landlord and tenant.

(4) Where the relation of landlord and tenant exists between the plaintiff and defendant, the landlord need not prove his title, but only the expiration of the tenancy; for a tenant cannot in general dispute his landlord's title (*y*), unless a defect in the title appears on the lease itself (*z*). But nevertheless he may show that his landlord's title has *expired*, by assignment, surrender, or otherwise (*a*). The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the plaintiff claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*b*).

Servants and licensees.

(5) The same principle is applicable to a licensee or servant, who is estopped from disputing the title of the person who licensed him (*c*).

ART. 133.—*Limitation.*

No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (*d*).

Exceptions. Disability.

(1) Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no action shall be brought after

(*y*) *Delaney* v. *Fox*, 26 L. J. C. P. 248.

(*z*) *Saunders* v. *Merryweather*, 35 L. J. Ex. 115; *Doe* d. *Knight* v. *Smythe*, 4 M. & S. 347.

(*a*) *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Walton* v. *Waterhouse*, 2 Wms. Saund. 420.

(*b*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531.

(*c*) *Doe* d. *Johnson* v. *Baytup*, 3 A. & E. 188; *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643 [Ex. Ch.].

(*d*) 37 & 38 Vict. c. 57, s. 1, replacing 3 & 4 Will. 4, c. 27, s. 2; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297. The owner of the legal estate must, however, be a party to the action (*Allen* v. *Woods*, 68 L. T. 143 [C. A.]).

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thirty years from the accrual of the right (*e*). But once the statute has begun to run against a party subsequent disability has no effect (*f*). But where the defendant has been guilty of some fraud or wrong and the plaintiff is unaware of the existence of his cause of action the period of limitation does not begin to run till the existence of his cause of action becomes known to the plaintiff (*g*).

Acknowledgment of title.

(2) When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment, in writing and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*h*).

Ecclesiastical corporations.

(3) The period in the case of ecclesiastical and eleemosynary corporations is sixty years (*i*).

ART. 134.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rents of lands, or of the death of the last rightful owner (*k*); and, (b) in respect of an estate in reversion or remainder or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes

(*e*) 37 & 38 Vict. c. 57, ss. 3–5, replacing 3 & 4 Will. 4, c. 27, ss. 16, 17.

(*f*) *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351.

(*g*) *Oelkers* v. *Ellis*, [1914] 2 K. B. 139.

(*h*) *Ley* v. *Peter*, 27 L. J. Ex. 239.

(*i*) 3 & 4 Will. 4, c. 27, s. 29.

(*k*) 3 & 4 Will. 4, c. 27, s. 3.

entitled to the possession, whichever of these periods may be the longer (*l*). Art. 134.

Discontinuance.

(1) Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (*m*). Therefore, in the case of mines, where they do not belong to the surface owner, the period cannot commence to run until someone actually works them; and even then it only commences to run *quâ* the vein actually worked (*n*).

Continual assertion of claim.

(2) No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (*o*). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period. As to what acts constitute dispossession, see *Littledale* v. *Liverpool College* (*p*).

(*l*) 37 & 38 Vict. c. 57, s. 2.

(*m*) See *Smith* v. *Lloyd*, 23 L. J. Ex. 194; *Cannon* v. *Rimington*, 12 C. B. 1.

(*n*) See *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186, 187; *Ashton* v. *Stock*, 6 Ch. D. 726.

(*o*) 3 & 4 Will. 4, c. 27, ss. 10, 11.

(*p*) [1900] 1 Ch. 19 [C. A.].

CANADIAN NOTES TO CHAPTER XIII. OF PART II.

Article 125.

In practice an action for trespass to land is commonly a means of settling a disputed title. Many of the decisions turn upon an analysis of the acts necessary to support a possessory title.

In *Brookman* v. *Conway* (1902), 35 N. S. R. 462 (affirmed 35 S. C. R. 185), the land, the title to which was in dispute, had been enclosed by mutual agreement between the parties to prevent cattle from straying. It was held that such enclosure did not deprive the plaintiff of possession so as to debar him from maintaining an action for trespass.

Numerous provincial statutes impose upon land-owners the obligation of maintaining fences of a certain character. It has been held that these requirements do not affect the common law liability of a cattle owner to keep his cattle from straying, unless he can prove that his animals strayed through an opening which it was the plaintiff's duty to keep fenced: *Garrioch* v. *McKay* (1901), 13 Man. L. R. 404.

The unsettled condition of the greater part of Canada has compelled the Canadian courts to take a somewhat strict view of the acts upon which a claim to possession is founded. For example, it has been held in the Supreme Court that such acts as lumbering operations, hunting, fishing, etc., on wilderness land do not constitute possession either for maintaining an action of trespass or for acquiring a title: *Sherren* v. *Pearson* (1887), 14 S. C. R. 581; *Wood* v. *Le Blanc* (1904), 34 S. C. R. 627. Such acts amount to nothing more than so many trespasses against the true owner. Possession, to be of any legal value, must be "open, notorious, continuous, exclusive" (34 S. C. R., at 633); the claimant must "keep his flag flying over the land he claims."

Similarly under the Quebec law the plaintiff in a possessory action must shew that his possession is "continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor" (C. C. 2193). It cannot be founded upon acts which are "merely facultative or of sufferance" (*actes de pure faculté et ceux de simple tolérance*): (Article 2196). For examples see *Couture* v. *Couture* (1901), 31 S. C. R. 716; *Pelletier* v. *Roy* (1913), 44 Que. S. C. 141.

In trespass cases the good faith of the defendant is of importance in assessing the damages: see *Lamb* v. *Kincaid* (1907), 38 S. C. R. 516, cited above in the notes to Article 36.

In the case of *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald* (1900), 31 S. C. R. 130, the plaintiff was the grantee of twelve acres of water-covered land in Lake Simcoe, the grant being made subject to the "free use, passage, and enjoyment of the waters of the lake," which is navigable. The defendant company, which was engaged in harvesting ice, cut a passage through the ice upon the plaintiff's lot in order to reach its own ice-houses on the shore. A majority of the Supreme Court held that the defendant was exercising a public right, and that the cutting of the passage therefore was no trespass, provided that it was done without causing unnecessary loss to the plaintiff.

Article 129.

See the cases already cited in the notes to Articles 44 and 45; also *Carr* v. *Canadian Pacific Ry. Co.* (1912), 5 D. L. R. 208.

Article 130.

Section 61 of the Criminal Code justifies the use of reasonable force against a trespasser, so far as criminal liability is concerned. Resistance by the trespasser constitutes an assault.

It has been held that where a stray animal trespasses upon land, the owner of the land has the right, although he has not erected the statutory fences, to tie up the animal and retain possession of until the cost of its keep is paid, subject to a corresponding obligation on his part to

care for it properly: *Bolton* v. *MacDonald* (1894), 3 Terr. L. R. 269.

The student should be careful to consult the provincial statutes in all cases relating to trespass by animals.

Articles 131-132.

Robinson v. *Osborne* (1912), 27 Ont. L. R. 248; 8 D. L. R. 1014, was an action to recover possession brought by a plaintiff who had a good paper title. The defendant put forward a possessory title, based upon his own occupation and that of previous trespassers. It appeared that there was a gap of a year in the occupation of his immediate predecessor, and the court held that this was fatal to the defendant's claim: "the moment the property becomes vacant the law attributes possession to the true owner" (Lennox, J.).

In *Mann* v. *Fitzgerald* (1912), 4 D. L. R. 274, neither party could make out a good paper title, and neither could shew exclusive possession. In such circumstances the plaintiff's action must be dismissed with costs.

All presumptions are in favour of the party in possession, and the plaintiff must remove every possibility of title in another before he can succeed: *Gaudet* v. *Hayes* (1906), 3 E. L. R. 152.

Article 133.

The statutory periods differ in various provinces.

In *Noble* v. *Noble* (1912), 1 D. L. R. 516, the defendant and her husband were tenants-at-will of her father-in-law's house, paying no rent, from 1895 until the date of action. There was a mortgage on the house, the interest on which was paid by the plaintiff until he paid off the loan in 1910. The court held that he thereupon derived title from the mortgagee, and that his action was therefore not barred.

CHAPTER XIV.

TRESPASS TO GOODS, DETENTION AND CONVERSION OF GOODS.

ART. 135.—*Definitions.*

THERE are three specific torts in respect of the possession of goods :

(i) *Trespass*, which consists in wrongfully taking goods out of the plaintiff's possession, or forcibly interfering with them whilst they are in his possession ;

(ii) *Detention of goods or detinue*, which consists in wrongfully detaining from the plaintiff goods to the immediate possession of which he is entitled ;

(iii) *Conversion*, which consists in the defendant's wrongfully converting to his own use goods to the possession of which the plaintiff is entitled, by taking them away, detaining them, destroying them, delivering them to a third person, or otherwise depriving the plaintiff of them.

NOTE.—The ancient causes of action for torts to goods were trespass and detinue. The action of "trover and conversion" was invented later, and was founded on the fiction that the defendant had found the plaintiff's goods and converted them to his own use.

The broad distinction between trespass on the one hand and conversion and detinue on the other hand, is that

Art. 135. trespass is the only cause of action where the goods interfered with *remain in the possession* of the plaintiff; whereas an action for conversion or detention lies when the plaintiff is wrongfully deprived of the possession of his goods by the defendant.

Trespass.

Trespass may be the result of an intentional conscious act of taking or touching goods, or may be the result of mere negligence. So where A. drives his carriage so negligently that it collides with B.'s carriage, this is a trespass (*a*), just as, if he collides with B.'s person, it would be trespass to the person. But it seems that there must be either intention or negligence, and a merely accidental touching does not constitute trespass (*b*).

The principal distinction between detention and conversion is in the remedy sought.

Detinue for return of goods.

When the defendant has got possession of the plaintiff's goods (whether wrongfully in the first instance, or by keeping them wrongfully after having lawfully obtained possession) the plaintiff can sue either for wrongful detention or for conversion, but generally an **action for detention** is brought where the defendant is at the time of action brought in wrongful possession of **specific goods**, such as a horse or a picture, which the plaintiff wishes to have returned to him.

Conversion for damages.

Conversion is the appropriate remedy where the plaintiff seeks merely **to recover as damages** the value of goods of which the defendant has deprived him. Thus, it is the proper remedy where the defendant no longer has possession of the goods, or where they cannot be identified, such as so many bushels of corn, or so much coal.

Actions for conversion or detention of goods are often brought to try title to goods, and, if the plaintiff proves his title, it is no defence that the defendant thought he himself had a good title. Thus, a person who buys A.'s goods from B. (thinking they are B.'s), and then, quite innocently, sells them to C., is guilty of a conversion, as also is C. if he refuses to give them up, or consumes them.

(*a*) *Lotan* v. *Cross*, 2 Camp. 464. (*b*) See *ante*, Art. 3.

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Justification.

A trespass may be justified as being done in self-defence or in exercise of a right, or in other ways illustrated by the examples below.

Illustrations.

(1) If one draws wine out of a cask and fills up the deficiency with water, he converts the whole cask. He converts the wine he draws out by taking it, and the remainder by turning it into something different, and so destroying it (*c*).

Excessive execution.

(2) So, again, if a sheriff sells more goods than are reasonably sufficient to satisfy a writ of *fieri facias*, he will be liable for a conversion of those in excess (*d*).

Injuring animals.

(3) Beating the plaintiff's dogs is a trespass (*e*).

Intention immaterial.

(4) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewellery from a drawer in the room in which he had died to a cupboard in another room, in order to insure its safety, and the jewellery was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, and that it was no defence that she had removed the goods *bonâ fide* for their preservation, and she was consequently held liable for nominal damages. It was suggested, however, that if the removal was in fact reasonably necessary for their preservation and was carried out in a reasonable manner, that might have been a good defence (*f*). But, on the other hand, the finder of a lost chattel does not commit a tort by merely warehousing or otherwise safeguarding it for a reasonable time until the true owner be discovered, so long as he is not unnecessarily officious (*g*). However, the intention to deny the owner's right or to assert a right not consistent with that of the owner is proved where the goods are used or taken as his own property by the defendant (*h*).

(*c*) *Richardson* v. *Atkinson*, 1 Stra. 576.

(*d*) *Aldred* v. *Constable*, 6 Q. B. 370, at p. 381.

(*e*) *Dand* v. *Sexton*, 3 Term Rep. 37.

(*f*) *Kirk* v. *Gregory*, 1 Ex. D. 55.

(*g*) See *per* BLACKBURN, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 757, at p. 766.

(*h*) *Lancashire and Yorkshire Rail. Co.* v. *MacNicoll* (1918), 88 L. J. K. B. 601.

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(5) Again, where the owner of household furniture assigned it by bill of sale to the plaintiff, and subsequently employed the defendants (who were auctioneers) to sell it for her by auction, and they sold *and delivered possession* to the purchaser from them, they were held liable, although they knew nothing of the bill of sale (*i*). It is important, however, to note that the tort there was the *delivering* of the furniture to the purchaser, and not the mere selling of it (*j*).

Conversion by innocent purchaser.

(6) So the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title (*k*). Thus, in the leading case of *Hollins* v. *Fowler* (*l*), it was laid down that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

(7) Where, however, the true owner has parted with a chattel to A. upon an actual contract, though there may be circumstances which enable that owner to set the contract aside for fraud, yet a *bonâ fide* purchaser from A. will obtain an indefeasible title (*m*).

Sale in market overt.

(8) To this rule, however, there is an exception, that a sale of goods in market overt gives a good title to the purchaser, although the seller has no title. So a purchaser in market overt cannot be sued in an action for conversion if he parts with the goods or refuses to give them up on demand. But this rule only protects the purchaser, and the *seller* in market overt is guilty of conversion by selling

(*i*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495

(*j*) See *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502; and *per* BRETT, J., in *Fowler* v. *Hollins*, L. R. 7 Q. B. 616 [Ex. Ch.], at p. 627.

(*k*) Sale of Goods Act, 1893, s. 21, unless it be a negotiable security (as to which see *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591, and Sale of Goods Act, 1893, s. 25 (2), or unless he buy it in market overt (Sale of Goods Act, 1893, s. 22), and not even then if it was stolen and the thief had been prosecuted to conviction (*ibid.*, s. 24).

(*l*) L. R. 7 H. L. 757.

(*m*) Sale of Goods Act, 1893, s. 23.

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and delivering goods to which he has no title (*n*). The sale must be an open sale in a lawfully constituted market, and made according to the usages of the market. By special custom all shops in the City of London are market overt between sunrise and sunset for the sale of goods of the kind which by the trade of the owner are there put for sale by him. But the sale must be *by* the shopkeeper not *to* him, and it must take place in the open part of the shop, not in a room at the back (*o*).

Revesting on prosecution of thief.

Of this common-law exception there is, however, a modification by statute, first enacted by 21 Hen. 8, c. 11, and now contained in s. 24 of the Sale of Goods Act, 1893, viz., that where goods are *stolen* and the thief is prosecuted to conviction, the property revests in the original owner, notwithstanding a sale in market overt. But note that until the *conviction* of the thief the property is in the person who has acquired it by sale in market overt, and no act of his before the conviction of the thief is a conversion. So, where the plaintiff's sheep were stolen and sold in market overt to the defendant, and the defendant then resold and delivered them to another, and subsequently the thief was prosecuted and convicted, though the property then revested in the plaintiff, he had no remedy against the defendant. For when the defendant sold the sheep they were his, not having then revested in the plaintiff (*p*).

Justification.

(9) It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act. Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*q*).

Self-defence or defence of property.

(10) A trespass committed in self-defence, or defence of property, is justifiable. Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner

(*n*) *Peer* v. *Humphrey*, 2 A. & E. 495; *Ganley* v. *Ledwidge*, 14 L. R. Ir. 31 [C. A.].

(*o*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031.

(*p*) *Horwood* v. *Smith*, 2 Term Rep. 750.

(*q*) *Slater* v. *Swann*, 2 Stra. 872.

Art. 135. of the property in order to save them, but not otherwise (*r*). But a man cannot justify shooting a dog, on the ground that it was chasing animals *feræ naturæ* (*s*), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*t*). So, too, though I may use reasonable force to remove trespassing animals from my land, I am liable in trespass if I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*u*).

In exercise of right.

(11) A trespass committed in exercise of a man's own rights is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

Legal authority.

(12) Due process of law is a good justification, as, for example, an execution under a writ of *fieri facias* (*w*).

ART. 136.—*Possession necessary to maintain an Action for Trespass.*

(1) To maintain an action for *trespass* to goods, the plaintiff must at the time of the trespass have been in possession of the goods.

(2) Any possession however temporary is sufficient against a wrongdoer.

(3) Although he cannot maintain an action for trespass, the person entitled to the reversion of goods may maintain an action for any permanent injury done to them (*x*).

(*r*) *Wells* v. *Head*, 4 C. & P. 568.
(*s*) *Vere* v. *Lord Cawdor*, 11 East, 568.
(*t*) *Read* v. *Edwards*, 34 L. J. C. P. 31.
(*u*) *King* v. *Rose*, 1 Freem. 347.
(*w*) See *ante*, Art. 9.
(*x*) *Tancred* v. *Allgood*, 28 L. J. Ex. 362; *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502; *Mears* v. *London and South Western Rail. Co.*, 11 C. B. (N.S.) 850.

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Possession.

To enable him to bring an action for trespass, the plaintiff need not have actual physical possession; it is enough if the goods are in the physical possession of a servant or other person who holds them for him. This kind of possession is sometimes called "**constructive possession.**" So, too, where goods are in a warehouse or in a ship, and the owner has the documents of title by means of which he can get actual possession, he may be said to have constructive possession. Another kind of possession is "**possession by relation.**" An administrator or executor has possession by relation from the moment of the death of the intestate or testator, for his title relates back to the death. And this possession by relation is enough to support an action against a wrongdoer, although at the time of the wrongful act the administrator or executor had neither title nor actual possession, nor the right to immediate possession (*y*).

Illustrations.

(1) A master of a ship, as bailee of the cargo, has actual possession, and can sue for trespass (*z*), as also can a person who has possession of another's cattle under a contract of agistment (*a*).

(2) Upon the same principle it has been held that the Postmaster-General, as bailee in possession of letters delivered to him for carriage, can recover their value in an action for negligence against a wrongdoer, even though he would not himself be liable to the owners for their loss (*b*).

(3) An owner of a chattel who has gratuitously lent it to another may maintain trespass, as it is considered to be in his possession, although the borrower has the physical possession. A loan does not, in contemplation of law, take the possession out of the owner (*c*).

(*y*) *Tharpe* v. *Stallwood*, 5 Man. & Gr. 760; and see *Kirk* v. *Gregory*, 1 Ex. D. 55.

(*z*) *Moore* v. *Robinson*, 2 B. & Ad. 817.

(*a*) *Rooth* v. *Wilson*, 1 B. & A. 59.

(*b*) *The Winkfield*, [1902] P. 42 [C. A.].

(*c*) *Lotan* v. *Cross*, 2 Camp. 464

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ART. 137.—*Trespassers* ab initio.

If one, taking a chattel by authority given him by law, abuses his authority, he renders himself a trespasser *ab initio* (*d*).

Thus, where the defendant took a horse as an astray, as he was authorised by law to do, and then worked the horse (which he had no authority to do), he became a trespasser *ab initio*. But the rule only applies where the original authority is given by law—not where it is given by the *parties*—and the abuse must be misfeasance, not mere nonfeasance (*e*).

ART. 138.—*Conversion and Detention.*

(1) To maintain an action for wrongful detention the plaintiff must, as against the defendant, be entitled to immediate possession at the time of action brought.

(2) To maintain an action for conversion the plaintiff must, as against the defendant, have been entitled to immediate possession at the time of the conversion.

(3) The judgment in an action for wrongful detention is for the return of the goods and damages for their detention.

(4) The judgment in an action for conversion is for damages. The measure of damages is the value of the goods at the time of the conversion.

Comment.

The plaintiff need only show that he is entitled as against the defendant. He need not show a good title to the goods as against everyone: and as possession is always a good title against a wrongdoer, it is sufficient if the plaintiff shows that he had possession and the defendant has taken them out of his possession. In these actions the

(*d*) *Oxley* v. *Watts*, 1 Term Rep. 12. (*e*) *Ibid.*

plaintiff is not required to show that the defendant did not act in good faith (*f*). **Art. 138.**

Judgment.

In an action for wrongful detention the plaintiff gets judgment for the return of the specific goods detained or (if the plaintiff prefers) their value, and the court may order that execution shall ensue for the return of the property itself; accordingly, in this form of action, the goods must be specific ascertained goods. The plaintiff may also have damages for the detention of the goods.

In an action for conversion the judgment is for damages only, and if the defendant **satisfies the judgment,** he thereby pays for the goods, and they thereupon vest in him as if he had bought them (*g*).

Proof of conversion or detention.

A conversion or detention is commonly proved by *demand and refusal.* If the defendant has the plaintiff's goods in his possession, this is not necessarily in itself a conversion or wrongful detention. If, however, he treats them as his own, as by delivering them to a third person or consuming them, he thereby converts them to his own use. Where there is nothing else in the nature of a conversion, the plaintiff should demand their return, and if the defendant refuses to return them, his refusal is evidence of a conversion. It is also evidence of wrongful detention, and the plaintiff may then bring his action and will succeed, unless the defendant can justify his refusal to return the goods on demand (*h*).

Illustrations.

Possession of bailee.

(1) If a hirer or carrier of my goods wrongfully delivers them to a third person, the bailment is thereby determined, and the immediate right of possession at once revests in me, so that I can sue in conversion either the bailee or the person to whom he has delivered them (*i*).

(*f*) *Pridgeon* v. *Mellor* (1912), 28 T. L. R. 261.

(*g*) *Cooper* v. *Shepherd*, 3 C. B. 266. But judgment without satisfaction does not change the property in the goods (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584); and see *Eastern Construction Co., Limited* v. *National Trust Co., Limited*, [1914] A. C. 197.

(*h*) See *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.]; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031.

(*i*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Wyld* v. *Pickford*, 8 M. & W. 443.

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Pledge.

(2) But where goods are pledged, no action for conversion or detention will lie against the pledgee for selling them or repledging them until tender of the debt has been made and refused (*j*).

Sale of property under lien.

(3) And so, when, by a sale of goods, the property in them has passed to the purchaser, subject to a mere lien for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*k*).

Possession of trustee.

(4) A trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his *cestui que trust*, for he has in law the right to immediate possession (*l*).

Possession of a mere finder.

(5) In the leading case of *Armory* v. *Delamirie* (*m*), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. In short, a defendant cannot set up a *jus tertii* against a person in actual possession.

(6) But the finder of lost goods has no title against anyone who can show a better title. So, where a workman found a ring embedded in mud on land which was in the possession of the plaintiffs, it was held that, as finder, he acquired no title against them. The plaintiffs being in possession of the land, were in possession of the ring also. Consequently, the finder was liable to them in an action for detention when he refused to give it up to them (*n*).

(7) A bailee of goods may maintain trespass or conversion against a wrongdoer, by virtue of his having the actual

(*j*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299 [Ex. Ch.].

(*k*) *Page* v. *Cowasjee Eduljee*, L. R. 1 P. C. 127; *Martindale* v. *Smith*, 1 Q. B. 389.

(*l*) *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*m*) 1 Sm. L. C. 356.

(*n*) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

possession. So also may the bailor as he is in possession by the bailee. Thus, when an article is lent the borrower or the lender may bring an action against a wrongdoer (*o*). So also may the owner of goods let on hire (*p*), and the pledgee of goods pawned (*q*). The bailee, if he succeeds in an action of conversion, recovers the full value of the goods as damages, and must account to the bailor (*r*). The true principle is not too clear. It would seem that satisfaction of the bailee does not preclude the right of the bailor unless the bailee acknowledges the right of the bailor to be indemnified. Art. 138.

ART. 139.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*s*). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*t*).

Once having elected to treat the transaction as a sale, as by receiving or suing for part of the purchase-money, the plaintiff cannot afterwards sue in tort. If an action for money had and received is brought, that is a conclusive election to waive the tort; and so the bringing of an action of conversion or trespass is a conclusive election not to waive the tort. These are conclusions of law (*u*). In other cases it is a question of fact whether or not there has been an election; and if the facts show an intention to retain

(*o*) *Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Burton* v. *Hughes*, 2 Bing. 173.

(*p*) *Cooper* v. *Willomatt*, 1 C. B. 672.

(*q*) *Swire* v. *Leach*, 18 C. B. (N.S.) 479.

(*r*) See *The Winkfield*, [1902] P. 42 [C. A.], where the principles and cases are fully discussed; *Eastern Construction Co.* v. *National Trust Co.*, [1914] A. C. 197.

(*s*) *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Oughton* v. *Seppings*, 1 B. & Ad. 241; *Notley* v. *Buck*, 8 B. & C. 160.

(*t*) *Brewer* v. *Sparrow*, 7 B. & C. 310.

(*u*) *Smith* v. *Baker*, L. R. 8 C. P. 350.

Art. 139. the remedy in tort against one tort-feasor, a settlement with another one will not affect that right, although the plaintiff may have sued alternately both in tort and for money had and received, and although he may have got an interim injunction restraining any dealings with the money (*x*).

ART. 140.—*Trespass and Conversion by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner when the latter has done some act inconsistent with the joint ownership of the plaintiff (*y*).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby (*z*).

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*a*).

ART. 141.—*Remedy by Recaption.*

When anyone has been unlawfully deprived of his goods, he may lawfully reclaim and take them wherever he happens to find them, but not in a riotous manner or attended with breach of the peace, and he can justify an assault made for the purpose of recapturing after demand and refusal (*b*).

(*x*) *Rice* v. *Reed*, [1900] 1 Q. B. 54 [C. A.].

(*y*) 2 Wms. Saund. 47 o ; and see *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*z*) *Barnardiston* v. *Chapman*, cited 4 East, 121.

(*a*) *Mayhew* v. *Herrick*, 7 C. B. 229.

(*b*) *Blades* v. *Higgs*, 30 L. J. C. P. 347.

ART. 142.—*Remedy by Action of Replevin.* Art. 142.

The owner of *goods distrained* is entitled to have them returned upon giving such security as the law requires to prosecute his suit without delay against the distrainer, and to return the goods if a return should be awarded (*c*).

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes them to be replevied to the person from whom they were seized, on his giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds £20, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (*d*).

ART. 143.—*Orders for Restitution of Stolen Goods.*

If any person who has stolen property is prosecuted to conviction by or on behalf of the owner, the property is to be restored to the owner, and the court before whom such person is tried has power to order restitution of the property to the owner (*e*).

(*c*) See County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 134-137.

(*d*) 51 & 52 Vict. c. 43, ss. 133-136.

(*e*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100.

Art. 143. Therefore, even if the goods were sold by the thief in market overt, yet, by this section, they must be given up to the original owner. Apparently where a bailee allows the court to make an order for restitution without informing the court that he holds on behalf of a bailor, he is liable to the bailor for the loss of the article (*f*).

(*f*) *Ranson* v. *Platt*, [1911] 1 K. B. 499.

CANADIAN NOTES TO CHAPTER XIV. OF PART II.

Article 135.

In *Mackenzie* v. *Scotia Lumber & Shipping Co.* (1913), 47 N. S. R. 115; 12 E. L. R. 464; 11 D. L. R. 729, the servants of the defendant company had inadvertently made use of the plaintiff's raft, which was returned to the plaintiff as soon as the error was discovered. The court held that an action for conversion was maintainable, but that only nominal damages could be recovered.

Actions for conversion in Canada frequently arise out of the wrongful cutting of timber upon the plaintiff's land. In *Greer* v. *Faulkner* (1908), 40 S. C. R. 399, the timber had been cut by wilful wrongdoers and sold by them to one of the defendants, who purchased in good faith and sold to the other defendant. The second purchaser interpleaded, paying the purchase-money into court, and the action was decided between the plaintiff and the first purchaser. The court held that a conversion took place, not only when the trees were first felled, but when the second sale took place, since the logs remained the plaintiff's property throughout. Consequently the plaintiff was entitled to the whole of the purchase-money without deductions. See also *Field* v. *Richards* (1913), 13 D. L. R. 943.

Article 136.

For a review of the law governing possession as a necessary element of the plaintiff's case see the judgment of the Privy Council in *Eastern Construction Co.* v. *National Trust Co.* (1914), A. C. 197, where the true owner had transferred title to the defendant, and it was held that this defeated the plaintiff's claim; also *Dutton* v. *Canadian Northern Ry. Co.* (1916), 26 Man. L. R. 493; 34 W. L. R. 881; 21 Can. Ry. Cas. 294; 10 W. W. R. 1006; 30 D. L. R. 250, where the principle of possession was applied to a case of negligence.

ARTICLE 138.

See the notes on Articles 135-136. It will be noted that in *Greer* v. *Faulkner* the plaintiff elected to claim the purchase-money instead of demanding the return of the logs which had been converted.

Under the Quebec law the *bona fide* purchaser of stolen goods can only be compelled to restore them to the true owner upon being repaid the sum which he has paid for them, if they have been bought at a fair or market, or at a public sale, or from a trader dealing in such articles (C. C. 1489).

The rights of special classes of pledgees, such as bankers and pawnbrokers, are dealt with in the Bank Act (R. S. C., c. 29) and provincial statutes. In Quebec a pledgee not falling within the privileged classes has no right of sale, except in the usual way by order of a court (C. C. 1971).

ARTICLE 140.

In *Kay* v. *Chapman* (1913), 4 W. W. R. 448; 6 Sask. L. R. 69; 24 W. L. R. 80, the plaintiff's partner fraudulently sold the whole property of the firm to the defendant, who resold it to other parties. The defendant accepted without inquiry the partner's assurance that he had authority to sell. It was held that the defendant was liable for conversion.

ARTICLE 141.

The right of peaceable recaption is protected by section 56 of the Criminal Code, but it is provided that this does not justify a physical assault upon the wrongdoer.

ARTICLE 142.

Replevin is a matter of procedure, and is therefore governed entirely by provincial statutes, the forms of which must be complied with in each case. For decisions the student should consult the various digests.

ARTICLE 143.

The restitution of stolen property is provided for by section 1050 of the Criminal Code. Section 1049 enacts that the *bona fide* purchaser of stolen property may be compensated out of money found in the possession of the thief.

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